(25,380)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1916.

No. 550.

SPRING VALLEY WATER COMPANY, APPELLANT,

vs.

CITY AND COUNTY OF SAN FRANCISCO AND TAX COLLECTOR OF SAID CITY AND COUNTY.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

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No. 2543

United States

Circuit Court of Appeals

For the Ninth Circuit.

SPRING VALLEY WATER COMPANY, a Corporation,

Appellant,

vs.

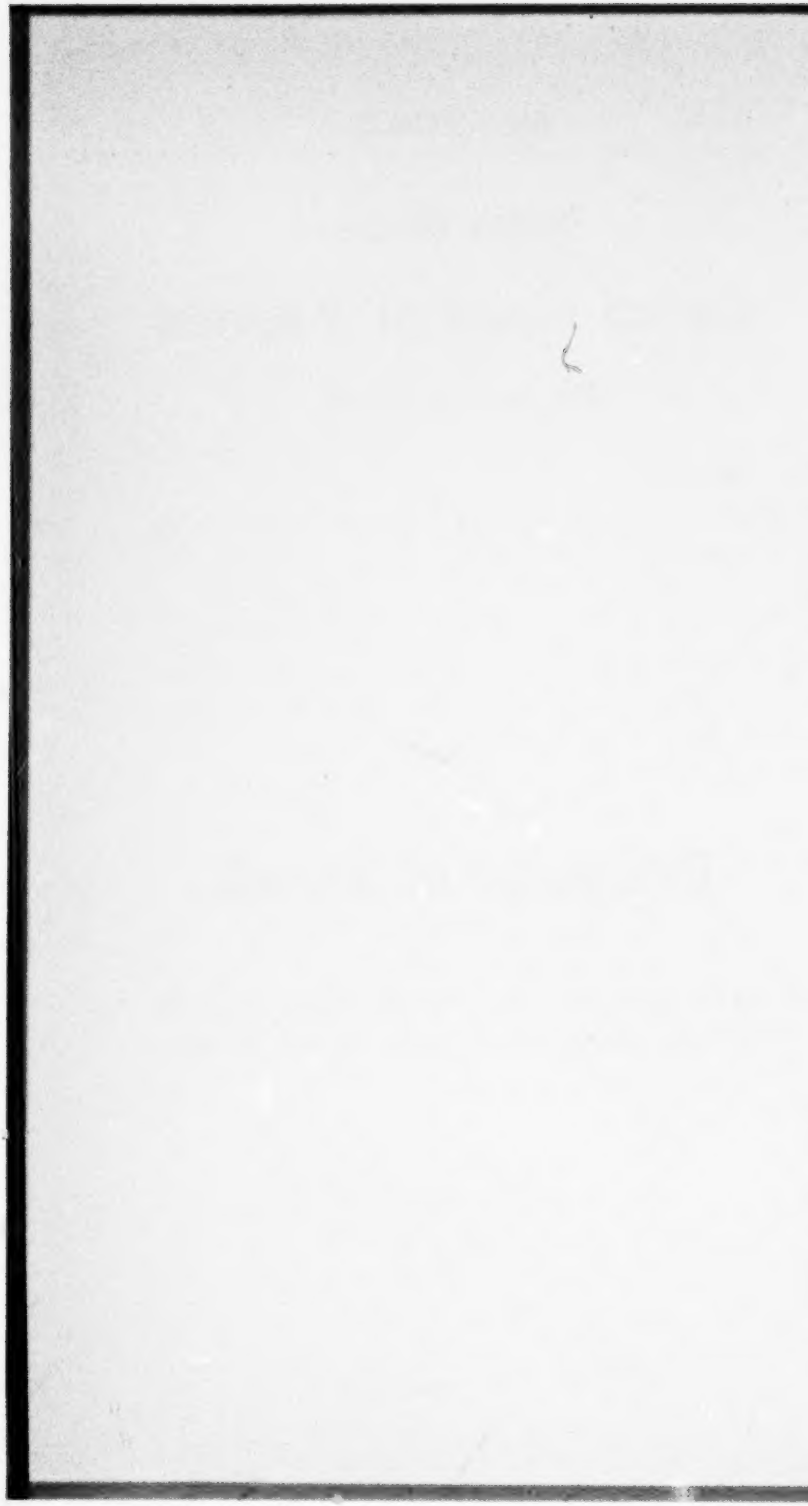
CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and TAX COLLECTOR of Said City and County,

Appellees.

Transcript of Record.

Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.



In the District Court of the United States, Northern District of California, Second Division.

Nos. 14,735—14,892—15,131—15,569—15,344—26.

Division No. 2.

SPRING VALLEY WATER COMPANY, a Corporation,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO, et al.,

Defendants.

Notice of Motion [for Order Directing Payment of Taxes, etc.].

To SPRING VALLEY WATER COMPANY a Corporation, and McCUTCHEON, OLNEY and WILLARD, its Attorneys:

To the Crocker National Bank of San Francisco; to the First National Bank of San Francisco; to the Anglo & London Paris Bank of San Francisco; to the Union Trust Company of San Francisco; to the Mercantile National Bank of San Francisco; to the Bank of California National Association of San Francisco; to the Wells Fargo Nevada Bank of San Francisco;

You, and each of you will please take notice that on Monday the 30th day of November, 1914, in the above-entitled Court and division, before the Hon. WILLIAM C. VAN FLEET, Judge presiding therein, at the hour of 10 o'clock A. M. or as soon thereafter as counsel can be heard, the undersigned will apply for an order in the above-entitled court directing the [1*] payment of the taxes levied and

*Page-number appearing at foot of page of original certified Record.

assessed against the above-named banks as receivers and depositories of moneys in litigation in the above-entitled actions.

Said motion will be based upon this notice, upon the tax bills heretofore rendered, and upon the grounds that said taxes are due, have not been paid and that Monday the 30th day of November is the last day permitted by law for the payment of said taxes with the addition of penalties.

PERCY V. LONG,
City Attorney,
Attorney for Tax Collector.

[Endorsed]: Filed November 30, 1914, Walter B. Maling, Clerk. **[2]**

In the District Court of the United States, Northern District of California, Second Division.

Nos. 14,275 — 14,735, — 14,892 — 15,131 — 15,569 —15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Defendants.

Stipulation as to Facts.

For the purposes of the determination of the application of the city attorney of the city and county of San Francisco, State of California, as attorney for the tax collector of said city and county, notice of

which was given on or about the 28th day of November, 1914, for an order of the above-entitled court directing the payment of the taxes levied and assessed against certain named banks as receivers and depositories of moneys in litigation in the above-entitled actions, complainant and defendants in the above-entitled actions, and the said city attorney as attorney for the said tax collector, hereby stipulate and agree that the following are the material facts in the determination of said application **[3]** and that said application may be heard and determined thereon:

On June 22, 1908, Spring Valley Water Company, a corporation, filed a bill of complaint in equity, No. 14,735, in what was then the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California, against the City and County of San Francisco, a municipal corporation, and the board of supervisors of said city and county.

The bill alleged that the complainant was engaged in the business of supplying the city and county of San Francisco and its inhabitants with water; that on June 15, 1908, the said board of supervisors passed a certain bill or ordinance, fixing the maximum rates to be charged for furnishing water to the city and county of San Francisco and its inhabitants for the fiscal year commencing July 1, 1908, and threatened to enforce the same against the complainant. The complainant further alleged that said bill or ordinance, and the rates fixed thereby, were wholly void, null, grossly unjust, unreasonable, fraudulent and unconstitutional under the provisions of the Con-

stitution of the United States, and were oppressive and confiscatory, and did not permit of or provide for a just or reasonable or fair compensation for the water to be supplied during the said year by complainant to the said city and county and its inhabitants. The Court was asked to enjoin the defendants and all consumers of water in said city and county, both pending the litigation and perpetually at its conclusion, from enforcing against the complainant the said bill or ordinance or the rates fixed therein.

On October 7, 1908, the circuit court directed that the preliminary injunction issue and, as certain of the conditions thereof, provided as follows: **[4]**

"2. All compensation collected while said injunction remains in force in excess of the rates specified in said ordinance, that is, the difference between the charge so collected and the amount which would have been collected from its customers, provided bills had been rendered therefor at the rates fixed by said ordinance, shall be paid by complainant into such bank or banks and on such terms as to interest and security as may be arranged and agreed upon by counsel with the approval of any federal judge sitting in this court. If counsel fail to agree, a depository will be named and the terms of deposit fixed by such a judge. All of the excess so collected shall be paid into such bank each month during the time this injunction remains in force and immediately after the same is collected. All moneys so collected shall be received by said bank or banks, or other selected depository, and held as a special deposit, appropriately entitled, upon which interest at a rate to be

agreed upon as hereinbefore provided shall be paid.

3. Such deposits shall be held subject to the order of this court, and shall only be paid out on checks to be drawn by a special master pursuant to such order, and countersigned by a federal judge sitting in this court.

4. As soon as possible after each such monthly deposit, said complainant shall file in this court an affidavit showing in detail the name and address of each customer, or such facts as may be sufficient to identify such customer, to whom water has been furnished, and the amount collected during such calendar month from each said customer for such water in excess of the amount which he would have paid under the rates specified in said ordinance, and the total amount deposited in such bank or banks during said month. **[5]**

5. In order to facilitate the return of moneys so deposited, in the event of a decision or order of this court directing such return, Southard Hoffman, clerk of this court, is hereby appointed a special master to ascertain and report as to the amounts to be paid to each individual claimant, and as to the identity of such claimant. He is thus selected as special master for the reason that the claimants of the fund will be extremely numerous, and their identity and the amount of their claims will have to be established by incessant reference to the sworn statements of complainant, which will be filed in this court, and be kept in the clerk's custody, and such reports can be most expeditiously and economically

consulted by a special master who is an officer of this court.

6. In the event complainant fails in this suit all charges so collected for water in excess of the rates specified in said ordinance shall be refunded to the person or persons from whom they were collected.

7. In the event this court shall adjudge any charge or charges for water made by complainant excessive, whether said ordinance be valid or invalid, such excess of charge, provided the same shall also be in excess of the rates fixed by said ordinance shall be returned to the person or persons from whom it was collected."

Thereafter, on October 24, 1908, said injunction was issued and has to the present time continued in force.

On December 14, 1908, pursuant to stipulation by the parties, the circuit court made the following order designating Mercantile Trust Company of San Francisco as the depository for the impounded moneys: [6]

"On stipulation of counsel for the respective parties, it is hereby ordered that, while and so long as the interlocutory injunction issued under the order made in the above-entitled cause on the 7th day of October, 1908, shall be in force, all compensation collected by complainant for water supplied to the city and county of San Francisco, or the inhabitants thereof, up to and including June 30, 1909, in excess of the rates specified in the ordinance referred to in the bill of complaint in this action shall be deposited by complainant with Mercantile Trust Company of

San Francisco in the city and county of San Francisco; and that all such moneys shall bear interest at the rate of two per cent per annum from the date of each deposit, and that the account representing such deposit shall be entitled 'Spring Valley Water Company—Special Account.' All such deposits shall be held subject to the order of the above-entitled court, and shall only be paid out on checks to be drawn by Southard Hoffman, clerk of the above-entitled court (who was by said order of October 7, 1908, appointed special master) and countersigned by a federal judge sitting in the above-entitled court."

Thereafter, similar complaints to enjoin the enforcement of the water rates for the fiscal years subsequently ensuing were filed by the Spring Valley Water Company against the city and county of San Francisco and the board of supervisors of said city and county, as follows:

No. 14,892, covering the rates for the fiscal year commencing July 1, 1909, filed June 15, 1909, in what was then the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 15,131, covering the rates for the fiscal year [7] commencing July 1, 1910, filed June 27, 1910, in what was then the Circuit Court of the United States, Ninth Judicial Circuit, Northern District of California.

No. 15,344, covering the rates for the fiscal year commencing July 1, 1911, filed June 26, 1911, in what was then the Circuit Court of the United States,

Ninth Judicial Circuit, Northern District of California.

No. 15,569, covering the rates for the fiscal year commencing July 1, 1912, filed June 26, 1912, in the District Court of the United States, Northern District of California, Second Division.

No. 26, covering the rates for the fiscal year commencing July 1, 1913, filed June 27, 1913, in the District Court of the United States, Northern District of California, Second Division.

In case No. 14,892, a temporary restraining order was issued by the circuit court on June 15, 1909, which temporary restraining order has, to the present time, continued in force. With the exception that no special master was therein appointed, this order made the same provisions for the impounding of the moneys as did the order for the preliminary injunction in case No. 14,735, as hereinbefore set forth. No stipulation or order designating the depository for the excess moneys, as in case No. 14,735, was subsequently made, but complainant deposited said moneys from time to time with Mercantile Trust Company of San Francisco, as in case No. 14,735.

In case No. 15,131, a temporary restraining order was issued by the circuit court on June 30, 1910, which temporary restraining order has, to the present time, continued in force. With the exception that no special master was therein appointed, this order made the same provisions for the impounding of the [8] moneys as did the order for the preliminary injunction in case No. 14,735, as hereinbefore set forth. No stipulation or order designating

the depository for the excess moneys, as in case No. 14,735, was subsequently made, but complainant deposited said moneys from time to time with Mercantile Trust Company of San Francisco, as in case No. 14,735.

In case No. 15,344, a temporary restraining order was issued by the circuit court on June 29, 1911, which temporary restraining order has, to the present time, continued in force. The restraining order made no provision for the impounding of the moneys, but, on August 5, 1911, it was stipulated by the parties that the excess moneys be impounded in Mercantile Trust Company of San Francisco. Said stipulation provided as follows:

"IT IS FURTHER STIPULATED that while and so long as the restraining order issued under the order made in the above-entitled cause on the 29th day of June, 1911, shall be in force, all compensation collected by complainant for water supplied to the City and County of San Francisco, or the inhabitants thereof, up to and including June 30, 1912, in excess of the rates specified in the ordinance referred to in the bill of complaint in this action, shall be deposited by complainant with Mercantile Trust Company of San Francisco, with the understanding, and subject to the condition, that any amounts so deposited shall be repaid to complainant in case it is successful in this action. In case complainant is not successful, and the rates fixed by ordinance and set forth in the complaint herein are held to be valid, then said amounts so collected shall be returned to the person or persons entitled thereto." **[9]**

On July 29, 1912, by orders of the District Court of the United States, Northern District of California, Second Division, in cases No. 14,892, 15,131 and 15,344, J. A. Schaertzer was appointed special master. Said orders were worded as follows:

"Whereas, it appears to the court that, in the above-entitled action, a certain amount of money has been deposited by complainant with Mercantile Trust Company of San Francisco, pending a determination of the questions involved in this action; and,

Whereas, said amount so deposited is to be withdrawn only on a check, or checks, drawn by a special master and signed by a special judge sitting in this court:

Now, therefore, it is hereby ordered that, in order to facilitate the return of moneys so deposited, in the event of a decision or order of this court directing such return, J. A. Schaertzer, deputy clerk of this court, is hereby appointed special master to ascertain and report as to the amounts to be paid to each individual claimant and as to the identity of such claimant. He is thus selected and appointed a special master for the reason that the claimants of the fund will be extremely numerous, and their identity and the amount of their claims will have to be established by incessant reference to the sworn statements of complainant which will be filed in this court and kept in the clerk's custody, and such reports can be most expeditiously and economically consulted by a special master who is an officer of this court."

On the same day, by a similar order made by the same court in case No. 14,735, the said J. A. Schaertzer was appointed special master as successor to Southard Hoffman, deceased. **[10]**

In case No. 15,569, the district court, on July 20, 1912, ordered that a preliminary injunction issue. Said order provided as follows:

"IT IS FURTHER ORDERED, pursuant to stipulation of the parties hereto, on file herein, that all amounts collected by complainant, in the above-entitled action, in excess of the rates fixed by ordinance for the fiscal year beginning July 1, 1912, be deposited and impounded each month with Mercantile Trust Company of San Francisco, pending a determination of the questions involved in said action, and that within fifteen (15) days after each monthly deposit complainant file in this court an affidavit showing in detail the name and address of each customer, or such facts as may be sufficient to identify such customer, to whom water has been furnished, and the amount collected during said calendar month from each said customer for such water in excess of the amount which he would have paid under the rates specified in said ordinance, and the total amount deposited in said bank during said month. The amounts so deposited shall be withdrawn only on checks drawn by a special master and countersigned by a federal judge, sitting in this court.

In order to facilitate the return of moneys so deposited, in the event of a decision or order of this court directing such return, J. A. Schaertzer, deputy clerk of this court, is hereby appointed a special mas-

ter to ascertain and report as to the amounts to be paid to each individual claimant and as to the identity of such claimant. He is thus selected as special master for the reason that the claimants of the fund will be extremely numerous and their identity and the amount of their claims will have to be established by incessant reference to [11] the sworn statements of complainant which will be filed in this court and kept in the clerk's custody, and such reports can be most expeditiously and economically consulted by a special master who is an officer of this court.

Thereafter, on July 24, 1912, said injunction was issued, which injunction has, up to the present time, continued in force.

In case No. 26, a temporary restraining order was made by the district court on June 30, 1913, which temporary restraining order has, up to the present time, continued in force. Thereafter, on July 15, 1913, the district court, by an order making the same provisions in this regard as did the order for the preliminary injunction in case No. 15,569, as hereinbefore set forth, directed the money to be impounded in Mercantile Trust Company of San Francisco, and appointed J. A. Schaertzer special master.

In accordance with the stipulations and orders of court in suits No. 14,735, 14,892, 15,131, 15,344, 15,569 and 26, hereinbefore referred to, complainant, from time to time, deposited with Mercantile Trust Company of San Francisco the moneys collected by it in excess of the rates fixed by the various ordinances. Subsequently to the depositing of the moneys with Mercantile Trust Company of San Francisco in each

of the above-numbered suits, the district court, from time to time, ordered a portion of the moneys so deposited in each of said suits to be transferred to certain of the following named institutions, to wit: Wells Fargo Nevada National Bank of San Francisco, The Crocker National Bank of San Francisco, The Bank of California National Association, Union Trust Company of San Francisco, The First National Bank of San Francisco, and The Anglo and London Paris National Bank. Said orders were worded as follows: [12]

"Whereas, the amount of money deposited with the Mercantile Trust Company of San Francisco, in this cause and others between the same parties, is greater than, in the opinion of the court, should be deposited with a single depositary:

Now, in consideration of the premises, it is ordered that, of the moneys so deposited with said Mercantile Trust Company of San Francisco in the above-entitled cause (amounting in the aggregate to the sum of ——— dollars, besides interest), there shall be deposited the sum of ——— dollars, with each of the following named institutions, to wit, ———, each of which has heretofore been designated by this court as a depository in bankruptcy proceedings, and each of which is hereby apointed a depositary for the purposes of this order.

In order that said Mercantile Trust Company of San Francisco shall not be inconvenienced by having all said moneys withdrawn at one time, it is hereby ordered that ——— dollars of said sum shall be deposited with each of said depositaries, herein

named, on the —— day of ———, and that ——— dollars shall be deposited with each of said depositaries on the —— day of ———, and J. A. Schaertzer, heretofore appointed special master in this cause, is directed to draw checks upon and against said Mercantile Trust Company of San Francisco and in favor of the depositaries herein named, for the amounts so directed to be deposited, and to present said checks to a federal judge, sitting in this court, for countersignature.

And it is further ordered that the said moneys, so to be deposited, shall be taken and accepted as a special deposit by each of said depositaries, herein named, and shall, with interest [13] at two (2) per cent. per annum, compounded monthly (which is the rate of interest now paid by said Mercantile Trust Company of San Francisco on the moneys so deposited with it), from the date of receipt by the depositary of each installment to the date of payment, be credited to the Spring Valley Water Company, but shall be held subject to the order of this court in this cause, and shall only be paid out on checks to be drawn by J. A. Schaertzer, heretofore appointed special master in this cause, and countersigned by a federal judge, sitting in this court."

On the first Monday in March, 1913, the amounts of moneys on deposit with the various banks in suits No. 14,735, 14,892, 15,131, 15,344 and 15,569, pursuant to the stipulations and orders hereinbefore set forth, were as follows:

WELLS FARGO NEVADA NATIONAL BANK OF SAN FRANCISCO:

Suit No. 14,735	$20,080.08	
Suit No. 14,892	20,080.08	
Suit No. 15,131	20,080.08	
Suit No. 15,344	20,080.08	
Suit No. 15,569	20,080.08	$100,400.00

THE CROCKER NATIONAL BANK OF SAN FRANCISCO:

Suit No. 14,735	$20,081.20	
Suit No. 14,892	20,081.20	
Suit No. 15,131	20,081.20	
Suit No. 15,344	20,081.20	
Suit No. 15,569	20,081.20	$100,406.00

[14]

THE BANK OF CALIFORNIA NATIONAL ASSOCIATION:

Suit No. 14,735	$25,249.67	
Suit No. 14,892	50,499.31	
Suit No. 15,131	63,124.15	
Suit No. 15,344	63,124.15	$201,997.28

UNION TRUST COMPANY OF SAN FRANCISCO:

Suit No. 14,735	$25,250.97	
Suit No. 14,892	50,501.98	
Suit No. 15,131	63,127.50	
Suit No. 15,344	63,127.50	$202,007.95

THE FIRST NATIONAL BANK OF SAN FRANCISCO:		
Suit No. 14,735	$25,251.04	
Suit No. 14,892	50,502.10	
Suit No. 15,131	63,127.66	
Suit No. 15,344	63,127.66	$202,008.46
THE ANGLO AND LONDON PARIS NATIONAL BANK:		
Suit No. 14,735	$25,253.84	
Suit No. 14,892	50,507.70	
Suit No. 15,131	63,134.63	
Suit No. 15,344	63,134.63	$202,030.80
MERCANTILE TRUST COMPANY OF SAN FRANCISCO:		
Suit No. 14,735	$45,885.29	
Suit No. 14,892	75,525.07	
Suit No. 15,131	36,178.59	
Suit No. 15,344	48,966.30	
Suit No. 15,569	163,907.96	$370,463.21

[15]

On the first Monday in March, 1914, the amounts of moneys on deposit with the various banks in suits No. 14,735, 14,892, 15,131, 15,344, 15,569 and 26, pursuant to the stipulations and orders hereinbefore set forth, were as follows:

WELLS FARGO NEVADA NATIONAL BANK OF SAN FRANCISCO:		
Suit No. 14,735	$20,490.92	
Suit No. 14,892	40,579.93	
Suit No. 15,131	20,490.92	
Suit No. 15,344	20,490.92	
Suit No. 15,569	65,691.18	
Suit No. 26	25,111.25	$192,855.12
THE CROCKER NATIONAL BANK OF SAN FRANCISCO:		
Suit No. 14,735	$20,492.19	
Suit No. 14,892	40,582.43	
Suit No. 15,131	20,492.19	
Suit No. 15,344	20,492.19	
Suit No. 15,569	65,694.97	
Suit No. 26	25,112.66	$192,866.63
THE BANK OF CALIFORNIA NATIONAL ASSOCIATION:		
Suit No. 14,735	$40,832.35	
Suit No. 14,892	51,532.85	
Suit No. 15,131	64,416.09	
Suit No. 15,344	64,416.09	
Suit No. 15,569	45,197.76	
Suit No. 26	25,109.89	$291,505.03

[16]

UNION TRUST COMPANY OF SAN FRANCISCO:		
Suit No. 14,735	$25,767.65	
Suit No. 14,892	51,535.45	
Suit No. 15,131	64,419.33	
Suit No. 15,344	79,537.48	
Suit No. 15,569	45,153.89	$266,413.80
THE FIRST NATIONAL BANK OF SAN FRANCISCO:		
Suit No. 14,735	$40,834.55	
Suit No. 14,892	51,535.64	
Suit No. 15,131	64,419.59	
Suit No. 15,344	64,419.59	
Suit No. 15,569	45,200.27	$266,409.64
THE ANGLO AND LONDON PARIS NATIONAL BANK:		
Suit No. 14,735	$25,770.68	
Suit No. 14,892	51,541.44	
Suit No. 15,131	64,426.78	
Suit No. 15,344	79,495.22	
Suit No. 15,569	45,207.81	$266,441.93
MERCANTILE TRUST COMPANY OF SAN FRANCISCO:		
Suit No. 14,735	$16,695.64	
Suit No. 14,892	36,899.07	
Suit No. 15,131	36,918.82	
Suit No. 15,344	19,839.71	
Suit No. 15,569	44,073.35	
Suit No. 26	140,900.53	$295,327.12

[17]

There has been assessed to the Wells Fargo Nevada National Bank of San Francisco on the assessment-roll of the city and county of San Francisco, State of California, for the fiscal year 1914–1915, in volume entitled "Vol. 16 W. X. Y. Z. Unsecured Personal Property 1914" at page 42 of said volume, in the manner hereinafter set forth the sum of $100,400.00. In the said assessment the Wells Fargo Nevada National Bank of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States wherein the Spring Valley Water Company is plaintiff and city and county of San Francisco et al., defendants." There is added to the last mentioned designation the words "(Assessment for the year 1913)." On the said assessment there are the further words, "Escaped assessment for the year 1913."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of $2,289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $2,298.16.

There has been further assessed to the Wells Fargo Nevada National Bank of San Francisco on the said assessment-roll, in the manner hereinafter set forth, the sum of $192,855.00. In the said assessment the Wells Fargo Nevada National Bank of San Francisco is described as "Receiver of Impounded

Moneys," and is further described as "Receiver or depository under order of Court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and [18] City and County of San Francisco et al., defendants. The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of $2,289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $4,414.45.

There has been assessed to The Crocker National Bank of San Francisco on the assessment-roll of the City and County of San Francisco, State of California, for the fiscal year 1914–1915, in volume entitled "Vol. 3C Unsecured Personal Property 1914" at page 96 of said volume, in the manner hereinafter set forth the sum of $100,406.00. In the said assessment The Crocker National Bank of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of Court of the Impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." There is added to the last mentioned designation the words "(Assessment for the year 1913)." On the said assessment there

are the further words "Escaped assessment for the year 1913."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of $2,289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $2,298.29.

There has been further assessed to The Crocker National Bank of San Francisco on the said assessment-roll, in the manner hereinafter set forth, the sum of $192,866.00. In the said [19] assessment The Crocker National Bank of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of Court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." The said property has been assessed on the said assesment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of $2,289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $4,414.70.

There has been assessed to The Bank of California National Association on the assessment-roll of the city and county of San Francisco, State of California, for the fiscal year 1914–1915, in volume entitled "Vol. 2B Unsecured Personal Property 1914" at

page 16 of said volume, in the manner hereinafter set forth the sum of $201,997.00. In the said assessment The Bank of California National Association is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." There is added to the last-mentioned designation the words "(Assessment for the year 1913)." On the said assessment there are the further words "Escaped assessment for the year 1913."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been [20] levied thereon for said fiscal year at the rate of $2.289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $4,623.71.

There has been further assessed to The Bank of California National Association on the said assessment-roll, in the manner hereinafter set forth, the sum of $291,505.00. In the said assessment The Bank of California National Association is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,-344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., Defendants."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of $2.289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $6672.55.

There has been assessed to the Union Trust Company of San Francisco on the assessment-roll of the city and county of San Francisco, State of California, for the fiscal year 1914–1915, in volume entitled "Vol. 15 T. U. V. Unsecured Personal Property 1914" at page 90 of said volume, in the manner hereinafter set forth the sum of $202,007.00. In the said assessment the Union Trust Company of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San [21] Francisco et al., defendants." There is added to the last mentioned designation the words "(Assessment for the year 1913)." On the said assessment there are the further words, "Escaped assessment for the year 1913."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of $2.289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $4,623.94.

There has been further assessed to the Union Trust Company of San Francisco on the said assessment-roll, in the manner hereinafter set forth, the sum of $266,413.00. In the said assessment the Union Trust Company of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of $2.289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $6,098.20.

There has been assessed to The First National Bank of San Francisco on the assessment-roll of the city and county of San Francisco, State of California, for the fiscal year 1914–1915, in volume entitled "Vol. 5 E. F. Unsecured Personal Property 1914" at page 114 of said volume, in the manner hereinafter set forth the sum of $202,008.00. In the said assessment The [22] First National Bank of San Francisco is described as "Receiver of Impounded Moneys," and is further described as 'Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley

Water Company is plaintiff and City and County of San Francisco et al., defendants." There is added to the last mentioned designation the words "(Assessment for the year 1913)." On the said assessment there are the further words, "Escaped assessment for the year 1913."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of $2.289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $4,623.96.

There has been further assessed to The First National Bank of San Francisco on the said assessment-roll, in the manner hereinafter set forth, the sum of $266,409.00. In the said assessment The First National Bank of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of $2,289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $6,098.11. [23]

There has been assessed to The Anglo and London Paris National Bank on the assessment-roll of the

city and county of San Francisco, State of California, for the fiscal year 1914–1915, in volume entitled "Vol. 1A Unsecured Personal Property 1914" at page 59 of said volume, in the manner hereinafter set forth the sum of $202,030.00. In the said assessment The Anglo and London Paris National Bank is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." There is added to the last mentioned designation the words "(Assessment for the year 1913)." On the said assessment there are the further words, "Escaped assessment for the year 1913."

The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of $2.289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $4,624.47.

There has been further assessed to The Anglo and London Paris National Bank on the said assessment-roll, in the manner hereinafter set forth, the sum of $266,441.00. In the said assessment The Anglo and London Paris National Bank is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Num-

bered 14,275—14,735—14,892—15,131—15,569—15,-344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San [24] Francisco et al., defendants." The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of $2,289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $6,098.84.

There has been assessed to Mercantile Trust Company of San Francisco on the assessment-roll of the City and County of San Francisco, State of California, for the fiscal year 1914–1915, in volume entitled "Vol. 10M Unsecured Personal Property 1914," at page 56 of said volume, in the manner hereinafter set forth the sum of $370,463. In the said assessment, Mercantile Trust Company of San Francisco is described as "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,829—15,-131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." There is added to the last mentioned, and taxes have been levied thereon for the said fiscal year at the rate of $2.289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $8,479.89.

There has been further assessed to Mercantile Trust Company of San Francisco on the said assess-

ment-roll, in the manner hereinafter set forth, the sum of $295,327. In the said assessment Mercantile Trust Company of San Francisco is described as [25] "Receiver of Impounded Moneys," and is further described as "Receiver or depository under order of court of the impounded moneys in Equity Suits Numbered 14,275—14,735—14,892—15,131—15,569—15,344—26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." The said property has been assessed on the said assessment-roll on the said valuation above mentioned, and taxes have been levied thereon for said fiscal year at the rate of $2.289 on each $100 of said valuation, the said taxes computed at the said rate amounting to the sum of $6,760.04.

The last two assessments, to wit, those against Mercantile Trust Company of San Francisco, were originally assessed to Mercantile National Bank of San Francisco, owing to an erroneous return made by the latter institution. The said assessments were corrected by the assessor on the assessment-rolls subsequently to the making of the aforesaid application for an order of court, so that said assessment-rolls now show said moneys to be assessed to Mercantile Trust Company of San Francisco.

Suit No. 14,275, referred to in each of the foregoing assessments, is an action similar to those hereinbefore set forth, and was commenced in the United States Circuit Court, Ninth Judicial Circuit, Northern District of California, by Spring Valley Water Company against the City and County of San Fran-

cisco and the Board of Supervisors of said city and county, in June, 1907. No moneys, however, were impounded in said suit, either by stipulation of the parties, order of court, or otherwise, and none of the above-mentioned banks were in possession of any moneys deposited in said suit, either on the first Monday in March, 1913, or on the first Monday in March, 1914. [26]

Suit No. 26, referred to in each of the foregoing assessments, was, as has been hereinbefore set forth, commenced on the 27th day of June, 1913, and, on the first Monday in March, 1913, none of the above-mentioned banks were in possession of any moneys deposited in said suit.

In suit No. 15,569, referred to in each of the foregoing assessments, no moneys were on deposit on the first Monday in March, 1913, with any of the following named banks: The Bank of California National Association, The Anglo and London Paris National Bank, The First National Bank of San Francisco, and Union Trust Company of San Francisco.

In Suit No. 26, referred to in each of the foregoing assessments, no moneys were on deposit on the first Monday in March, 1914, either with The Anglo and London Paris National Bank or Union Trust Company of San Francisco.

In each of the foregoing assessments no separate assessment was made of any moneys alleged to be impounded in any specified suit, but the assessment was made of all impounded moneys on deposit with each of said banks in all of the above named suits.

In none of the suits hereinbefore referred to have

any moneys been deposited with Mercantile National Bank of San Francisco.

In none of the suits hereinbefore referred to has any order appointing a receiver been made, unless the orders appointing the special master and requiring the impounding of the excess moneys in the various banks, as hereinbefore set forth, come within that category, but said banks have at all times held said moneys on deposit subject to the conditions specified in the stipulations by the parties and orders of Court, as hereinbefore set forth.

The money deposited by Spring Valley Water Company with the various banks, as hereinbefore stated, has in no instance [27] been kept as a separate or designated fund by any of said banks, but in each case has been mingled with the general funds of the bank and credited by said bank to the respective suit in connection with which it has been deposited.

Each of the above-named banks, to wit: Wells Fargo Nevada National Bank of San Francisco, The Crocker National Bank of San Francisco, The Bank of California National Association, Union Trust Company of San Francisco, The First National Bank of San Francisco, The Anglo and London Paris National Bank, Mercantile Trust Company of San Francisco, and Mercantile National Bank of San Francisco, has paid the one per cent tax assessed against it for the fiscal years 1913–1914 and 1914–

1915 under the provisions of Article XIII, Section 14, of the Constitution of California.

EDWARD J. McCUTCHEN,
Solicitors for Complainant.
McCUTCHEN, OLNEY & WILLARD
Of Counsel for Complainant.
PERCY V. LONG,
Solicitor for Defendants.
PERCY V. LONG,
City Attorney, Solicitor for Tax Collector.

[Endorsed]: Filed Dec. 29, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [28]

In the District Court of the United States, Northern District of California, Second Division.

Nos. 14,735—14,892—15,131—15,569—15,344—*~~15,3~~26.

Division No. 2.

SPRING VALLEY WATER COMPANY, a Corporation,
Plaintiff,
vs.
CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants.

(Order for Payment of Taxes.)

Upon reading the affidavit of Edward F. Bryant, Tax Collector in and for the City and County of San

*Corrected pursuant to Order signed and filed December 30, 1914, nunc pro tunc December 1, 1914. J. A. Schaertzer, Deputy Clerk.

Francisco, and upon motion of Percy V. Long, City Attorney of the City and County of San Francisco, IT IS HEREBY ORDERED that the sum of Eight Thousand Four Hundred Seventy-nine and 89/100 ($8,479.89) Dollars be paid out of sums deposited subject to order of this Court in the above-entitled

*Trust Company

actions in the Mercantile ~~National Bank,~~ of San Francisco, to said Tax Collector, being the taxes levied in acordance with Sections 3647 and 3649 of the Political Code upon certain sums received by

*Trust Company

said Mercantile ~~National Bank~~ of San Francisco as receivers and depositaries in accordance with orders heretofore made in the above entitled matters by the above entitled court; which sums escaped assessment for the fiscal year 1913–14;

AND IT IS FURTHER ORDERED that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said bank for the payment of said sum of Eight Thousand, Four Hundred Seventy-nine & 89/100 ($8,479.89) Dollars, as [29] taxes out of the sums impounded and deposited in said bank as aforesaid.

Dated: December 1st, 1914.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 1, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [30]

In the District Court of the United States, Northern District of California, Second Division.

Nos. 14,735—14,892—15,131—15,569—15,344—15,326.

SPRING VALLEY WATER COMPANY, a Corporation,

Plaintiff,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Defendants.

(Order Nunc Pro Tunc for Order Directing Payment Taxes on Impounded Money by Mercantile Trust Company of San Francisco.)

WHEREAS, on the first day of December, 1914, this Court made its order directing payment by the Mercantile National Bank to E. F. Bryant, Tax Collector of the City and County of San Francisco, of the sum of Eight Thousand Four Hundred Seventy-nine and 89/100 ($8,479.89) Dollars as taxes for the fiscal year 1914–15, on the impounded rate moneys in the above-entitled actions; and

WHEREAS, it apears that no moneys were deposited with the Mercantile National Bank in the above-entitled actions and that moneys were deposited with the Mercantile Trust Company of San Francisco in the above-entitled actions; and

WHEREAS, it now appears that the assessment of the moneys so taxed had been originally erroneously made against said Mercantile National Bank,

instead of against the Mercantile Trust Company of San Francisco, as receiver and depository, where said moneys were actually on deposit; and

WHEREAS, the said Mercantile Trust Company of San Francisco paid said taxes in compliance with the said order directed to the Mercantile National Bank, and [31]

WHEREAS, prior to receipt of said taxes by the said Tax Collector, said erroneous assessment was regularly corrected on the books by the Assessor of the City and County of San Francisco and said taxes now appear thereon to have been duly paid by the Mercantile Trust Company of San Francisco, receiver as aforesaid, and

It appearing to the Court, ~~upon stipulation of all parties concerned,~~ that said order of December 1, 1914, should be corrected to conform with said payment, in order that the same shall appear to have been made upon authorization of this Court,

NOW THEREFORE, it is hereby ORDERED that the order of this Court made the first day of December, 1914, directing the payment by the Mercantile National Bank to Edward E. Bryant, Tax Collector of the City and County of San Francisco, of the sum of Eight Thousand Four Hundred Seventy-nine and 89/100 ($8,479.89) Dollars, taxes as aforesaid, be corrected on its face so as to order said payment to be made by the Mercantile Trust Company of San Francisco as receiver and depository of said impounded moneys; and the clerk of the Court is hereby authorized and directed to make such correction *nunc pro tunc;* and it is further ordered

that the action of the Mercantile Trust Company of San Francisco in paying said taxes be and it is hereby ratified, confirmed and approved.

Dated December 30, 1914.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 30, 1914, *nunc pro tunc* Dec. 1, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [32]

In the District Court of the United States, Northern District of California, Second Division.

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Defendants.

Petition for Appeal.

SPRING VALLEY WATER COMPANY, a Corporation, complainant in the above-entitled action, feeling itself aggrieved by the decision of the Court in said action and the order entered herein on the 1st day of December, 1914, wherein and whereby it was ordered that the sum of $8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with MERCANTILE TRUST COMPANY OF SAN FRANCISCO, subject to the orders of the

above-entitled court in the above-entitled actions, and wherein and whereby it was further ordered that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said bank for the payment of said sum of $8,479.89, as taxes, out of the sums deposited and impounded in said bank as aforesaid; comes now, by its undersigned solicitors, and appeals from said order to the United States Circuit Court of Appeals, and prays that this, its petition for said appeal, may be allowed **[33]** and that a transcript of the record and proceedings and papers upon which said order was made, duly authenticated, may be sent to said United States Circuit Court of Appeals for the Ninth Circuit; and now, at the time of the filing of said petition for appeal, the said appellant files an assignment of errors setting up separately and particularly each error asserted and intended to be urged in the United States Circuit Court of Appeals for the Ninth Circuit.

Your petitioner further prays that an order be made fixing the amount of the cost bond which this appellant shall give and furnish upon said appeal.

And your petitioner will ever pray.

EDWARD J. McCUTCHEN,
A. CRAWFORD GREENE,
Solicitors for Said Complainant.

McCUTCHEN, OLNEY & WILLARD,
Of Counsel for Complainant.

[Endorsed]: Filed Dec. 30, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. **[34]**

In the District Court of the United States, Northern District of California, Second Division.

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Defendants.

Assignment of Errors.

Now comes SPRING VALLEY WATER COMPANY, a corporation, complainant in the above-entitled actions, by its undersigned solicitors, and says that in the record, proceeding and order made and entered in these cases on the first day of December, 1914, wherein and whereby it was ordered that the sum of $8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with Mercantile Trust Company of San Francisco, subject to the orders of the above-entitled court in the above-entitled actions, and wherein and whereby it was further ordered that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said Mercantile Trust Company of San Francisco for the payment of said sum of $8,479.89, as taxes, out of the sums deposited and impounded in said Mercantile Trust Company of San Francisco as aforesaid, there is manifest error, in that the said complaint has been denied its just rights by the order

entered by said district court, and the said complainant hereby assigns and sets out **[35]** separately and particularly the following errors, viz.:

I.

The Court erred in refusing to deny the application of the City Attorney of the City and County of San Francisco, State of California, as attorney for the Tax Collector of said city and county, for an order of the above-entitled court directing the payment of the taxes levied and assessed against the above-named Mercantile Trust Company of San Francisco as receiver and depository of moneys in litigation in the above-entitled actions.

II.

The Court erred in making its order directing that the sum of $8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of sums deposited in Mercantile Trust Company of San Francisco, subject to the order of said court in the above-entitled actions, and in further ordering that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said Mercantile Trust Company of San Francisco for the payment of said sum of $8,479.89, as taxes, out of the sums deposited and impounded in said Mercantile Trust Company of San Francisco, as aforesaid.

III.

The Court erred in making said order and in holding and deciding that said taxes were assessed and levied in accordance with Sections 3647 and 3649 of the Political Code of California, or in accordance

with either of said sections.

IV.

The Court erred in making said order and in holding and deciding that said moneys, deposited in said Mercantile Trust Company of San Francisco, as aforesaid, were moneys in litigation in the possession of said Mercantile Trust Company of San Francisco as receiver. **[36]**

V.

The Court erred in making said order and in holding and deciding that said taxes were assessed and levied upon certain sums received by said Mercantile Trust Company of San Francisco as a receiver and depositary in accordance with orders heretofore made in the above-entitled actions by the above-entitled court.

VI.

The Court erred in making said order and in holding and deciding that said taxes were validly and lawfully assessed.

VII.

The Court erred in making said order and in holding and deciding that said taxes were validly and lawfully assessed as moneys in litigation in the possession of said Mercantile Trust Company of San Francisco as receiver.

VIII.

The Court erred in making said order and in holding and deciding that said taxes were validly and lawfully assessed and levied as taxes on moneys which had escaped assessment for the fiscal year 1913–1914.

IX.

The Court erred in making said order, because it appears from the undisputed facts of the case that said assessment was originally made to Mercantile National Bank and that said assessment was changed by the assessor on the assessment-rolls subsequent to the 28th day of November, 1914, without authority of law, so that said assessment would show said moneys to be assessed to Mercantile Trust Company of San Francisco. [37]

X.

The Court erred in making said order, because it appears from the undisputed facts of the case that in none of the above-entitled actions have any moneys been deposited with Mercantile National Bank of San Francisco.

XI.

The Court erred in making said order, because it appears from the undisputed facts of the case that, in action No. 14,275, referred to in the assessment to said Mercantile Trust Company of San Francisco, no moneys were on deposit with said Mercantile Trust Company of San Francisco on the first Monday in March, 1913.

XII.

The Court erred in making said order, because it appears from the undisputed facts of the case that in action No. 26 of the above-entitled actions, referred to in the assessment to said Mercantile Trust Company of San Francisco, no moneys were on deposit with said Mercantile Trust Company of San Francisco on the first Monday in March, 1913.

XIII.

The Court erred in making said order and in directing that the sum of $8,479.89 be paid out of sums deposited in said Mercantile Trust Company of San Francisco in the above-entitled actions and in not directing or specifying what sum should be paid out of the sum deposited in said Mercantile Trust Company of San Francisco in each of said actions.

XIV.

The Court was without jurisdiction to make said order, or any order directing payment of taxes out of said moneys, because it appears from the undisputed facts of the case that said moneys [38] were deposited by complainant with said Mercantile Trust Company of San Francisco pursuant to stipulations by the parties and orders of court in the above-entitled actions that said moneys should be returned to complainant in the event complainant was successful in said actions, or, in the event that the charges collected by complainant should be held excessive, that said moneys should be refunded to the persons from whom they were collected.

XV.

The Court was without jurisdiction to make said or any order directing the payment of taxes out of the moneys deposited by complainant with said Mercantile Trust Company of San Francisco in action No. 15,344 of the above-entitled actions, because it appears from the undisputed facts of the case that said moneys were deposited by complainant with said Mercantile Trust Company of San Francisco pursuant to a stipulation by the parties in the above-

entitled action that said deposit should be subject to the condition that any amount so deposited would be repaid to complainant in case it should be successful in said action, or in case the rates fixed by the ordinance in question should be held valid, then said amounts would be returned to the persons entitled thereto, and were not deposited in said Mercantile Trust Company of San Francisco pursuant to any order of court directing that said moneys should be held subject to the order of the court in the above-entitled action.

XVI.

The Court erred in making said order, because it appears from the undisputed facts of the case that said Mercantile Trust Company of San Francisco had paid the one per cent tax assessed against it for the fiscal year 1913–1914 under the provisions [39] of Article XIII, Section 14, of the Constitution of California.

WHEREFORE, said complainant, Spring Valley Water Company, prays that the order of the above-entitled court be set aside and that an order be entered denying the aforesaid application.

Dated: San Francisco, California, December 30, 1914.

EDWARD J. McCUTCHEN,
McCUTCHEN, OLNEY & WILLARD,
Of Counsel for Complainant.
A. CRAWFORD GREENE,
Solicitors for Complainant.

[Endorsed]: Filed Dec. 30, 1014. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [40]

In the District Court of the United States, Northern District of California, Second Division.

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Defendants.

Order Permitting an Appeal and Fixing Amount of Cost Bond on Appeal.

WHEREAS, in the District Court of the United States, Ninth Circuit, Northern District of California, on the 1st day of December, 1914, an order was made and entered in the above-entitled cause, wherein and whereby it was ordered that the sum of $8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with MERCANTILE TRUST COMPANY OF SAN FRANCISCO, subject to the orders of the above-entitled court in the above-entitled actions, and wherein and whereby it was further ordered that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said bank for the payment of said sum of $8,479.89, as taxes, out of the sums deposited and impounded in said bank as aforesaid; and,

WHEREAS, Spring Valley Water Company, a corporation, complainant in the above-entitled action,

has, on this [41] 30th day of December, 1914, filed its petition for the allowance of an appeal from said order to the United States Circuit Court of Appeals, Ninth Circuit, together with an assignment of errors, in and by which said petition it has prayed that an order be made fixing the amount of the cost bond which it shall give and furnish on said appeal;

NOW, THEREFORE, in consideration of the premises, and good cause appearing therefor, it is ordered that said appeal be, and the same is hereby, permitted and allowed.

IT IS FURTHER ORDERED, that the said Spring Valley Water Company, a corporation, complainant herein, shall file its undertaking and cost bond in form and substance conditioned and with sureties in accordance with the provisions of the law and the rules and practice of this court in the said United States District Court in the sum of $300 00/100, which said bond and sureties thereon shall be approved before filing, and said amount is hereby fixed as the amount of said bond. Said bond will be approved by a judge of this court.

WM. C. VAN FLEET,
United States District Judge.

[Endorsed]: Filed Dec. 30, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [42]

In the District Court of the United States, Northern District of California, Second Division.

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Defendants.

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS:

That we, SPRING VALLEY WATER COMPANY, a Corporation, as principal, and MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation organized under the laws of the State of Massachusetts, and duly authorized to execute bonds and undertakings in judicial proceedings pending in the courts of the United States, as surety, are held and firmly bound unto the CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and the Tax Collector of said city and county, in the full and just sum of Three Hundred (300) Dollars, lawful money of the United States, to be paid to the said City and County of San Francisco, a municipal corporation, and the Tax Collector of said city and county, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our

heirs, successors, representatives and assigns firmly by these presents. [43]

Sealed with our seals, and dated this 30th day of December, 1914.

WHEREAS, the above-named complainant, Spring Valley Water Company, a corporation, has obtained from the District Court of the United States, Northern District of California, its order allowing said complainant to appeal to the United States Circuit Court of Appeals in and for the Ninth Circuit, to reverse an order made and entered in the above-entitled actions, wherein and whereby it was ordered that the sum of $8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with MERCANTILE TRUST COMPANY OF SAN FRANCISCO, subject to the orders of the above-entitled court in the above-entitled actions, and wherein and whereby it was further ordered that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said bank for the payment of said sum of $8,479.89, as taxes, out of the sums deposited and impounded in said bank as aforesaid;

NOW, THEREFORE, the condition of this obligation is such that if the above-named complainant, Spring Valley Water Company, a corporation, shall prosecute such appeal to effect, and answer all costs if it shall fail to make good said plea, then this obligation shall be void; otherwise, to remain in full force and effect.

IN WITNESS WHEREOF, said SPRING VALLEY WATER COMPANY, a Corporation, has caused these presents to be executed by its Vice-president and Secretary, thereunto duly authorized, and its corporate seal to be hereunto affixed, and said MASSACHUSETTS BONDING AND INSURANCE COMPANY, a Corporation, has caused [44] these presents to be executed by its Attorneys in Fact, thereunto duly authorized, and its corporate seal to be hereunto affixed, this 30th day of December, 1914.

[Seal] SPRING VALLEY WATER COMPANY.

By S. P. EASTMAN,
Vice-President.

By JOHN E. BEHAN,
Secretary.

[Seal] MASSACHUSETTS BONDING AND INSURANCE COMPANY.

By JOHN H. ROBERTSON and FRANK M. HALL,
Attorneys in Fact.

The foregoing bond is hereby approved this 30th day of December, 1914.

WM. C. VAN FLEET,
Judge.

[Endorsed]: Filed Dec. 30, 1914. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [45]

In the District Court of the United States, Northern District of California, Second Division.

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Defendants.

Praecipe [for Transcript of Record].

The clerk of the above-entitled court will please prepare a transcript of the record for the appellate court in the above-entitled cause, and is directed to insert therein the following:

(1) The notice of motion for an order directing the payment of taxes on the impounded moneys.

(2) The agreed statement heretofore filed in the above-entitled cause on December 29, 1914.

(3) The order of court directing that the sum of $8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with Mercantile National Bank of San Francisco, subject to the orders of the above-entitled court in the above-entitled actions.

(4) The order of court correcting the above-mentioned order so as to refer to Mercantile Trust Company of San Francisco instead of to Mercantile National Bank of San Francisco. [46]

(5) All papers filed by complainant, Spring Val-

ley Water Company, a corporation, in the prosecution of its appeal, including petition for appeal, assignment of errors, order permitting appeal, and citation on appeal, the appeal bond and the approval of the same.

EDWARD J. McCUTCHEN,
A. CRAWFORD GREENE,
Solicitors for Complainant.
McCUTCHEN, OLNEY & WILLARD,
Of Counsel for Complainant.

[Endorsed]: Filed Jan. 2, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [47]

In the District Court of the United States, in and for the Northern District of California, Second Division.

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,

Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Defendants.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court of the United States, in and for the Northern District of California, do hereby certify the foregoing forty-seven (47) pages, numbered from 1 to 47 inclusive,

to be full, true and correct copies of the records and proceedings as enumerated in the praecipe for transcript of record, as the same remain on file and of record in the above-entitled cause, and that the same constitute the record on appeal to the United States Court of Appeals for the Ninth Circuit.

I further certify that the cost of the foregoing transcript of record is $28.40; that said amount was paid by Messrs. McCutchen, Olney & Willard, attorneys for plaintiff; and that the original citation issued herein is hereunto annexed.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 2d day of January, A. D. 1915.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Ten Cents Internal Revenue Stamp. Canceled Jan. 2, 1915. J. A. S.]

In the District Court of the United States, Northern District of California, Second Division.

Nos. 14,735—14,892—15,131—15,569—15,344—26.

SPRING VALLEY WATER COMPANY, a Corporation,
Complainant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,
Defendants.

Citation [on Appeal (Original)].

United States of America.—ss.

The President of the United States, to City and County of San Francisco, a Municipal Corporation, the Tax Collector of Said City and County, and Percy V. Long, City Attorney, Attorney for Said Tax Collector, and for Said City and County, Greeting:

YOU ARE HEREBY CITED and admonished to be and appear at a United States Circuit Court of Appeals, for the Ninth Circuit, to be holden at the City and County of San Francisco, State of California, on the 29th day of January, 1915, being within thirty days from the date hereof, pursuant to an order allowing an appeal filed in the clerk's office of the District Court of the United States, for the Northern District of California, Second Division, wherein Spring Valley Water Company, a corporation, complainant in said actions, is appellant, and you are appellees, to show cause, if any there be, why the order made and entered in said actions, wherein and whereby it was ordered, as in said order allowing appeal mentioned, that the sum of $8,479.89 be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with Mercantile Trust Company of San Francisco, subject to the orders of the above-entitled court in the above-entitled actions, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C. VAN FLEET, United States District Judge, for the Northern District of California, this 31st day of December, 1914.

WM. C. VAN FLEET,
United States District Judge.

Service of the within Citation and receipt of a copy is hereby admitted this 2d day of January, 1915.

PERCY V. LONG.

[Endorsed]: 14,735—14,892—15,131—15,569—15,-344 and No. 26. In the District Court of the United States, Second Division, Northern District of California. Spring Valley Water Company, a Corporation, Complainant, vs. City and County of San Francisco, et al., Defendants. Citation. "A" Filed Jan. 2, 1915. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 2543. United States Circuit Court of Appeals for the Ninth Circuit. Spring Valley Water Company, a Corporation, Appellant, vs. City and County of San Francisco, a Municipal Corporation, and Tax Collector of said City and County, Appellees. Transcript of Record. Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Filed January 2, 1915.

FRANK D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

At a stated term, to wit: the October Term A. D. 1914, of the United States Circuit Court of Appeals for the Ninth Circuit, held in the courtroom thereof, in the City and County of San Francisco, in the State of California, on Monday, the eleventh day of January, in the year of our Lord one thousand nine hundred and fifteen. Present: The Honorable WILLIAM W. MORROW, Circuit Judge, Presiding; Honorable WILLIAM C. VAN FLEET, District Judge.

Nos. 2547 to 2559, inclusive.

SPRING VALLEY WATER COMPANY, a Corporation,

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and TAX COLLECTOR OF SAID CITY AND COUNTY,

Appellees.

Order That Agreed Stipulation of Facts in Spring Valley Water Co. vs. City and County of S. F. may be Considered Part of Records in the Above-entitled Actions, etc.

On motion of Mr. A. Crawford Greene, counsel for the appellants, and by consent of Mr. Percy V. Long, counsel for the appellees, and pursuant to the stipulation of counsel filed January 5, 1915, it is ORDERED that the Agreed Stipulation as to facts contained in the Transcript of the Record in the cause entitled Spring Valley Water Company, a Corporation, Ap-

pellant, vs. City and County of San Francisco, a Municipal Corporation, and Tax Collector of said City and County, Appellees, No. 2543, may, for the purposes of appeal, be considered as a part of each of the Transcripts of the Records in the above-entitled actions in the same manner and to the same effect as if fully set out and inserted in each of said transcripts.

On like motion, it is FURTHER ORDERED that the above-entitled causes be, and hereby are assigned for hearing with the cause entitled Spring Valley Water Company, a Corporation, Appellant, vs. City and County of San Francisco, a Municipal Corporation, and Tax Collector of said City and County, Appellees, No. 2543, on March 18, 1915, and that all of said cases may be submitted on one brief on behalf of each of the respective parties hereto.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553. 2554, 2555, 2556, 2557, 2558, 2559.

SPRING VALLEY WATER COMPANY, a Corporation,

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO et al.,

Respondents.

Stipulation [That Agreed Stipulation of Facts Contains All Material Facts, etc.].

WHEREAS, on the first day of December, 1914,

the District Court of the United States, Northern District of California, Second Division, in actions Nos. 14,735—14,892—15,131—15,569—15,344 and 26, made and entered fourteen separate orders wherein and whereby it was ordered and directed that specified sums of money be paid to the Tax Collector of the City and County of San Francisco out of certain sums deposited with certain banks and depositories, subject to the orders of the aforesaid district court in the aforesaid actions; and,

WHEREAS, by stipulation of the parties hereto, each of said orders was made upon the same Agreed Stipulation as to facts; and,

WHEREAS, in action No. 2543 in the above-entitled court, on appeal from one of the aforesaid fourteen orders of said district court, the said Agreed Stipulation as to facts is fully set out and contained in the transcript of the record in said district court; and,

WHEREAS, by stipulation of the parties hereto and an order of the above-entitled court made in pursuance of said stipulation, the said Agreed Stipulation as to facts is incorporated by reference in each of the transcripts of the records in actions Nos. 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558 and 2559 in the above-entitled court;

NOW, THEREFORE, it is hereby stipulated and agreed by and between the parties hereto that the said Agreed Stipulation As to Facts contains all the material facts upon which the said district court made its said orders as aforesaid, and that said Agreed Stipulation as to facts contains all the ma-

terial facts which were set out and contained in the affidavit of Edward F. Bryant, Tax Collector in and for the City and County of San Francisco, State of California, which said affidavit is referred to in each of said orders as aforesaid.

Dated Jan. 12, 1915.

E. J. McCUTCHEN,
A. C. GREENE,
Solicitors for Appellant, Spring Valley Water Company.
McCUTCHEN, OLNEY & WILLARD,
Of Counsel for Appellant.
PERCY V. LONG,
City Attorney, Solicitor for Respondents.

[Endorsed]: Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559. United States Circuit Court of Appeals for the Ninth Circuit. Spring Valley Water Company, a Corporation, Appellant, vs. City and County of San Francisco et al., Respondents. Stipulation. Filed Jan. 12, 1915. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2543.

SPRING VALLEY WATER COMPANY, a Corporation, Appellant,
vs.
CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and Tax Collector of said City and County, Appellees.

Upon Appeal from the United States District Court for the Northern District of California, Second Division.

Portion of Proceedings Had in the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals for the Ninth Circuit.

Nos. 2543, 2547, 2548, 2549, 2550, 2551, 2552, 2553, 2554, 2555, 2556, 2557, 2558, 2559.

SPRING VALLEY WATER COMPANY, a Corporation, Appellant,
v.
CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and Tax Collector of said City and County, Appellees.

Opinion United States Circuit Court of Appeals.

Edward J. McCutchen and A. Crawford Greene for Appellant Percy V. Long, City Attorney, and Robert M. Searls, Assistant City Attorney, for Appellees.

Before Gilbert and Ross, Circuit Judges, and Wolverton, District Judge.

In June, 1908, the appellant as complainant instituted a suit in the court below against the City and county of San Francisco and the Board of Supervisors thereof, to enjoin the enforcement, during the years 1908-09, of certain water rates fixed by the Board. The cause was numbered 14,735. Similar suits with reference to the rates for subsequent fiscal years were thereafter instituted in 1909, 1910, 1911, 1912 and 1913. These causes are numbered respectively 14,892, 15,131, 15,344, 15,569, and 26. In suits numbered 15,735, 15,569 and 26 preliminary injunctions were issued upon condition that complainant should deposit in some bank or banks, to be agreed upon by the parties, the difference between the rates fixed by the municipal authorities and those actually collected by complainant; such excess to continue on deposit until final outcome of the suits. It was further provided that such deposits should be subject to the order of the court, and should be paid out only on the checks of a special master, countersigned by a Federal judge. A special master

was appointed, and directed to ascertain and report the amounts collected from each individual consumer. Subsequently the Mercantile Trust Company, of San Francisco, was designated as a depository for the impounded moneys, the order directing that such deposits be carried under an account entitled "Spring Valley Water Company—Special Account," and subject to the order of the court, as previously declared. In suits numbered 14,892 and 15,131 the procedure was the same, with the exception that complainant proceeded to deposit the moneys with the Mercantile Trust Company without any specific order designating the depository. In suit numbered 15,344 the restraining order made no provision for impounding the excess moneys, but it was subsequently stipulated that, so long as the order continued in force, the moneys collected should be deposited with the Mercantile Trust Company, and should be repaid as the final disposition of the cause might require. In this case a deputy clerk of the court was appointed special master. Deposits were made from time to time in pursuance of the order of the court. Subsequently portions of the amounts deposited were transferred, also by direction of the court, from time to time to other depositories, namely: Wells Fargo Nevada National Bank of San Francisco, Mercantile National Bank of San Francisco, The Crocker National Bank of San Francisco, Bank of California, National Association, Union Trust Company of San Francisco, and The Anglo and London Paris National Bank. The moneys found on deposit in each of these depositories on the first Monday of March, 1913, and the first Monday of March, 1914, were assessed for those years. In each assessment the designated bank or depository was described as "Receiver of Impounded Moneys," and further as "Receiver or Depository under Order of Court of the Impounded Moneys in Equity Suits numbered 14,275, 14,735, 14,892, 15,131, 15,569, 15,344 and 26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." On motion, the court directed the depositories to pay the taxes levied. There are 14 of these orders, and an appeal is prosecuted from each order. The appeals on the docket here are numbered 2543 and 2547 to 2559, inclusive. Each of the banks acting as a depository has paid the one per cent tax assessed against it for the fiscal years 1913-14 and 1914-15, under the provisions of Article XIII, Sec. 14, of the Constitution of the State of California.

WOLVERTON, *District Judge:*

It is urged that there was no legal authority for the assessments, or for making them in the manner in which they were made. Reliance is placed by the respondent upon section 3647 of the Political Code of California, under which it is claimed the assessments were regularly and rightfully made, which reads as follows:

"Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

The question turns largely upon whether the banks in which the

moneys were directed to be deposited were receivers within the meaning of the section of the statute just quoted. The Supreme Court of the United States has defined a receiver thus:

"A receiver is an indifferent person between parties, appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it."

Booth v. Clark, 17 Howard, 322, 331.

In Atlantic Trust Co. v. Chapman, 208 U. S. 360, 371, the court continues:

"He is an officer of the court; his appointment is provisional. He is appointed in behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is in custodia legis for whoever can make out a title to it. Delaney v. Mansfield, 1 Hogan, 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court."

A comprehensive definition is to be found in 34 Cyc. 15:

"A receiver is an indifferent person between the parties, appointed by the court, and on behalf of all parties, and not of the complainant or defendant only, to receive and hold the thing or property in litigation, pending the suit, to receive the rents, issues, or profits of land, or other thing in question; to receive rents or other income, and to pay ascertained outgoings, when it does not seem reasonable to the court that either party should hold it; to hold possession and control of property which is the subject-matter of litigation, and to dispose of the same or deliver it to such person or persons as may be directed by the court. He is said to be the arm and hand of the court, a part of the machinery of the court, by which the rights of parties are protected."

Now, the direction of the statute, so far as it could have application here, is that money in litigation in possession of a court must be assessed to the receiver. The money impounded constitutes the very essence of the controversy. It is the very thing about which the parties are not agreed respecting title and right of possession; hence the suit, and hence the litigation to determine their rights respecting it. The money, therefore, may be properly said to be in litigation. Further, it is also in possession of the court. It is recited that one of the conditions of the preliminary injunction is that the complainant should deposit the money in some bank or banks to be agreed upon by the parties, to continue on deposit until the final outcome of the action. And it was further provided that the deposit—that is, the money,—should be subject to the order of the court, and should be paid out only on checks drawn by a special master and countersigned by a Federal judge. The special master is an officer of the court. Could the money be any more completely under the control, and therefore in the possession of the court? The answer is obvious.

Now, what was the office and function of the banks? It was to hold the money subject to the order of the court. Such is the express provision of the injunctive process. The court has seized the money in the first instance through its injunctive process, has taken it away from the parties and possessed itself thereof, and has ordered it put in the banks, as custodians, to abide its orders. Thus it would seem, not only that the funds are in custodia legis, but that the banks themselves have become receivers of the funds. By whose authority did they become such receivers? Not by the authority of the parties, though with their consent, but by the authority of the court. This makes them receivers of the court, and there can be no other reasonable solution of the problem. Whether they be called depositories or receivers, or what not, their legal position is that of receivers of money or funds in the possession of the court.

The banks were primarily assessed as receivers of impounded moneys. Later a correction was made whereby they were designated as "Receivers or depository under order of court of the impounded moneys in equity suits," giving the numbers of the suits, the court in which they were pending, and their titles. The banks being receivers of the court, the money on deposit with them under the order and direction of the court was properly assessable to them as such receivers, and the assessments, we think, were regular, and legally made. The assessments being regular, the court was authorized to direct the receivers to pay the taxes levied. Los Angeles v. Los Angeles City Water Co., 137 Cal. 699.

As it pertains to actions numbered 14,892, 15,131 and 15,344, the money was potentially in the possession of the court, and the receivers of such moneys were properly assessable on them.

Another objection to the validity of the assessments is that the description is of "Impounded moneys in Equity Suits numbered 14,275, 14,735, 14,892, 15,131, 15,569, 15,344 and 26," while, as a matter of fact, no moneys whatever were ever impounded in suit No. 14,275; and none in suit No. 26, assessed for the year 1913-14; and, further, that the different funds pertaining to each suit were not separately assessed.

The first part of the objection goes to a misdescription of the funds, and the last to an alleged unwarranted commingling thereof by the taxing officers. But this relates to a matter of detail only, as the records of the court and the accounts kept by the different depositories, we assume, will show the particular funds involved and to what suits they are referable, so that there need be no confusion on that score. The assessment is really of a fund in custodia legis to the receiver, an officer of the court, and the question as to what portion of the fund is referable to a given suit is a mere matter of account and detail for the court officers, and not for the assessor and the taxing officers. The fund is chargeable with the tax, and the depository is entitled to credit for it when paid. When the ownership is determined and settled, the distribution of the fund, diminished by the amount of the tax, will follow, into whosesoever hands it may finally go.

This is decisive of a kindred objection, namely, that "the orders of the court * * * were erroneous in that they directed that one

sum should be paid by each bank on account of the tax assessed for each year, and did not specify or determine what amounts should be paid out of the moneys on deposit in each respective action." The point made is but illustrative of the distinction we draw respecting the detail of accounting as applied to the fund assessed, and the officers upon whom the duty pertaining thereto devolves. The court's orders follow the assessments, and are not a part of them. Independently thereof, the court's orders can create no confusion, as the records of the court and the accounts of the depositories will undoubtedly show the particular moneys involved in each proceeding.

Still another objection, which seems persuasive at first blush, is that, in the case of the Mercantile Trust Company, the moneys on deposit were assessed to the Mercantile National Bank, as Receiver, etc., an error attributable to the bank in reporting to the assessor the name of the depository having custody of the funds. But we think, considering that it was the fund that was assessable to the receiver, an officer of the court having its custody, the error was clerical rather than substantial, and did not vitiate the assessment.

It is another contention of appellant that, as it is provided relative to banks that there shall be levied upon the shares of the capital stock of such institutions an annual tax payable to the state of one per centum upon the value thereof, which tax shall be in lieu of all other taxes and licenses—state, county and municipal—upon such shares of stock and upon the property of such banks, with certain exceptions not material here (citing Art. XIII, Sec. 14, of the Constitution of California), there was no authority for assessment of these moneys in the hands of the bank.

The plain answer to this is, that the assessment here was not against the bank or its shares of stock, or other property of the bank, but against funds in the hands of a receiver of the court, the bank acting as such receiver. Indeed, the assessment against the funds does not affect the bank in any way, either to increase or to diminish its burdens under the taxing laws, and is not in the least inimical to the clause of the Constitution cited.

The orders of the court appealed from will therefore be affirmed, with costs in each case to the appellees.

(Endorsed:) Opinion. Filed Aug. 23, 1915. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2543.

SPRING VALLEY WATER COMPANY, a Corporation, Appellant,
vs.
CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and Tax Collector of said City and County, Appellees.

Decree United States Circuit Court of Appeals.

Appeal from the District Court of the United States for the Northern District of California, Second Division.

This Cause came on to be heard on the Transcript of the Record from the District Court of the United States for the Northern District of California, Second Division and was duly submitted:

On Consideration Whereof, It is now here ordered, adjudged, and decreed by this Court, that the order of the said District Court appealed from in this cause be, and hereby is, affirmed, with costs in favor of the appellees and against the appellant.

It is further ordered, adjudged and decreed by this Court, that the appellees recover against the appellant for their costs herein expended, and have execution therefor.

(Endorsed:) Decree. Filed and entered August 23, 1915. F. D. Monckton, Clerk, by Meredith Sawyer, Deputy Clerk.

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2543.

SPRING VALLEY WATER COMPANY, a Corporation, Appellant,
vs.
CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and Tax Collector of said City and County, Appellees.

Assignment of Errors.

Now comes Spring Valley Water Company, a corporation, appellant in the above-entitled cause, and files the following assignment of errors upon which it will rely on the prosecution of its appeal in the above-entitled cause, to the Supreme Court of the United States, from the order and decree made and entered in the above-entitled court on the 23d day of August, 1915.

I.

The above-entitled court erred in affirming the order of the District Court which directed that the sum of $8,479.89 be paid to the

Tax Collector of the City and County of San Francisco, State of California, out of the sums deposited in Mercantile Trust Company of San Francisco, subject to the order of said court in the certain specified actions, and which further ordered that John A. Schaertzer, Special Master in Chancery in said actions, draw his check upon said Mercantile Trust Company of San Francisco for the payment of said sum of $8,479.89, as taxes, out of the sums deposited and impounded in said Mercantile Trust Company of San Francisco, as aforesaid.

II.

The above-entitled court erred in holding and deciding that said taxes were assessed and levied in accordance with section 3647 of the Political Code of California.

III.

The above-entitled court erred in holding and deciding that said Mercantile Trust Company of San Francisco was a receiver.

IV.

The above-entitled court erred in holding and deciding that the assessment of said taxes was lawful and valid.

V.

The above-entitled court erred in not holding and deciding that the assessment was invalid because it referred to the moneys assessed as being on deposit in action No. 14,275, in which action no money was on deposit with said Mercantile Trust Company of San Francisco.

VI.

The above-entitled court erred in not holding and deciding that the assessment was invalid because the total sum on deposit with Mercantile Trust Company of San Francisco in the various actions was assessed as a unit instead of separate assessments having been made against the amounts deposited in each respective action.

VII.

The District Court was without jurisdiction to make said order, or any order directing payment of taxes out of said moneys, because it appears from the undisputed facts of the case that said moneys were deposited by appellant with Mercantile Trust Company of San Francisco pursuant to stipulations by the parties and orders of court that said moneys should be returned to appellant in the event appellant was successful in the pending actions, or, in the event that the charges collected by appellant should be held excessive, that said moneys should be refunded to the persons from whom they were collected.

Wherefore, said appellant, Spring Valley Water Company, prays that said order and decree be set aside and reversed, and that appropriate steps be taken to restore to said appellant all that it hath lost by reason of the order of the aforesaid District Court.

Dated: San Francisco, California, May 16, 1916.

EDWARD J. McCUTCHEN,
A. CRAWFORD GREENE,
Solicitors for said Appellant.
McCUTCHEN, OLNEY & WILLARD,
Of Counsel for said Appellant.

(Endorsed:) Assignment of Errors. Filed May 16, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2543.

SPRING VALLEY WATER COMPANY, a Corporation, Appellant,
vs.
CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and Tax Collector of said City and County, Appellees.

Præcipe for Transcript of Record.

The Clerk of the above entitled Court will please prepare a certified transcript of the record on appeal to the Supreme Court of the United States in the above entitled cause, and is hereby directed to insert therein the papers specified in the following stipulation, to wit:

It is hereby stipulated and agreed by and between the respective parties hereto that the following papers shall constitute the transcript of the record on appeal to the Supreme Court of the United States in the above entitled cause, to wit:

(1) Copy of printed transcript of record on which the above entitled cause was heard in the said Circuit Court of Appeals.

(2) Opinion of said Circuit Court of Appeals in the above entitled cause, filed August 23, 1915.

(3) Decree of said Circuit Court of Appeals in the above entitled cause, filed and entered August 23, 1915.

(4) Assignment of errors, filed by appellant in the prosecution of this appeal.

(5) Original citation on appeal.

(6) This præcipe and stipulation.

EDWARD J. McCUTCHEN,
A. CRAWFORD GREENE,
Solicitors for Appellant.
McCUTCHEN, OLNEY & WILLARD,
Of Counsel for Appellant.
PERCY V. LONG,
City Attorney,
ROBERT M. SEARLS,
Ass't City Att'y,
Solicitors for Appellees.

(Endorsed:) Præcipe for Transcript of Record. Filed May 29, 1916. F. D. Monckton, Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

No. 2543.

SPRING VALLEY WATER COMPANY, a Corporation, Appellant,
vs.
CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and Tax Collector of said City and County, Appellees.

Certificate of Clerk U. S. Circuit Court of Appeals to Transcript of Record upon Appeal to the Supreme Court of the United States.

I, Frank D. Monckton, as Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, do hereby certify the foregoing seventy-two (72) pages, numbered from and including 1, to and including seventy-two, to be a full, true and correct copy of, respectively:

(1) Printed Transcript of Record upon which the above entitled case was heard in said Circuit Court of Appeals:

(2) Opinion filed therein August 23, 1915;

(3) Decree filed and entered therein August 23, 1915;

(4) Assignment of Errors filed therein May 16, 1916;

(5) Præcipe for Transcript of Record on Appeal filed therein May 29, 1916, as the originals thereof remain on file and appear of record in my office, and that the same together constitute the Transcript of Record upon Appeal to the Supreme Court of the United States in the above entitled cause as made pursuant to said præcipe.

Attest my hand and the Seal of the United States Circuit Court of Appeals for the Ninth Circuit, at the City of San Francisco, in the State of California, this fifth day of June, A. D. 1916.

[Seal United States Circuit Court of Appeals.]

F. D. MONCKTON, *Clerk.*

[United States internal revenue documentary stamp, series of 1914, ten cents, canceled Jun- 5, 1916. F. D. M., Clk.]

In the United States Circuit Court of Appeals for the Ninth Circuit.

No. 2543.

SPRING VALLEY WATER COMPANY, a Corporation, Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, and Tax Collector of said City and County, Appellees.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to City and County of San Francisco, a Municipal Corporation; the Tax Collector of said City and County, and Percy V. Long, City Attorney, Attorney for said Tax Collector and for said City and County, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, D. C., within sixty days from the date hereof, pursuant to an order allowing an appeal filed in the Clerk's Office of the United States Circuit Court of Appeals for the Ninth Circuit, wherein Spring Valley Water Company, a corporation, appellant in said action, is appellant, and you are appellees, to show cause, if any there be, why the decree made and entered in said action on the 23rd day of August, 1915, affirming the order and decree theretofore made and entered by the District Court of the United States, Northern District of California, Second Division, wherein and whereby it was ordered, as in said order allowing appeal mentioned, that the sum of eight thousand four hundred and seventy-nine and 89/100 dollars ($8,479.89) be paid to the Tax Collector of the City and County of San Francisco, State of California, out of certain sums deposited with Mercantile Trust Company of San Francisco, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Wm. B. Gilbert, Judge of the United States Circuit Court of Appeals for the Ninth Circuit, this 18th day of May, 1916.

WM. B. GILBERT,
United States Circuit Judge.

Service of the within citation and receipt of a copy is hereby admitted this 18th day of May, 1916.

PERCY V. LONG,
Attorney for Appellees.

[Endorsed:] No. 2543. Docketed. United States Circuit Court for the Ninth Circuit. Spring Valley Water Company, a corporation, Appellant, vs. City and County of San Francisco, a Municipal Cor-

oration, et al., Appellees. Citation on Appeal. Filed May 18, 916. F. D. Monckton, Clerk U. S. Circuit Court of Appeals for he Ninth Circuit. McCutchen, Olney & Willard, Attorneys for Ap-ellant, 1107 Merchants Exchange Building, San Francisco, Cali-ornia.

Endorsed on cover: File No. 25,380. U. S. Circuit Court of Ap-eals, 9th Circuit. Term No. 550. Spring Valley Water Company, ppellant, vs. City and County of San Francisco and Tax Collector f said City and County. Filed July 7th, 1916. File No. 25,380.

Office Supreme Court, U. S.
FILED
JAN 9 1918
JAMES D. MAHER
Clerk

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1917

No. 211

SPRING VALLEY WATER COMPANY (a corporation),

Appellant,

vs.

CITY AND COUNTY OF SAN FRANCISCO (a municipal corporation), and TAX COLLECTOR of said City and County,

Appellees.

BRIEF FOR APPELLANT.

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
A. CRAWFORD GREENE,
Solicitors for Appellant.

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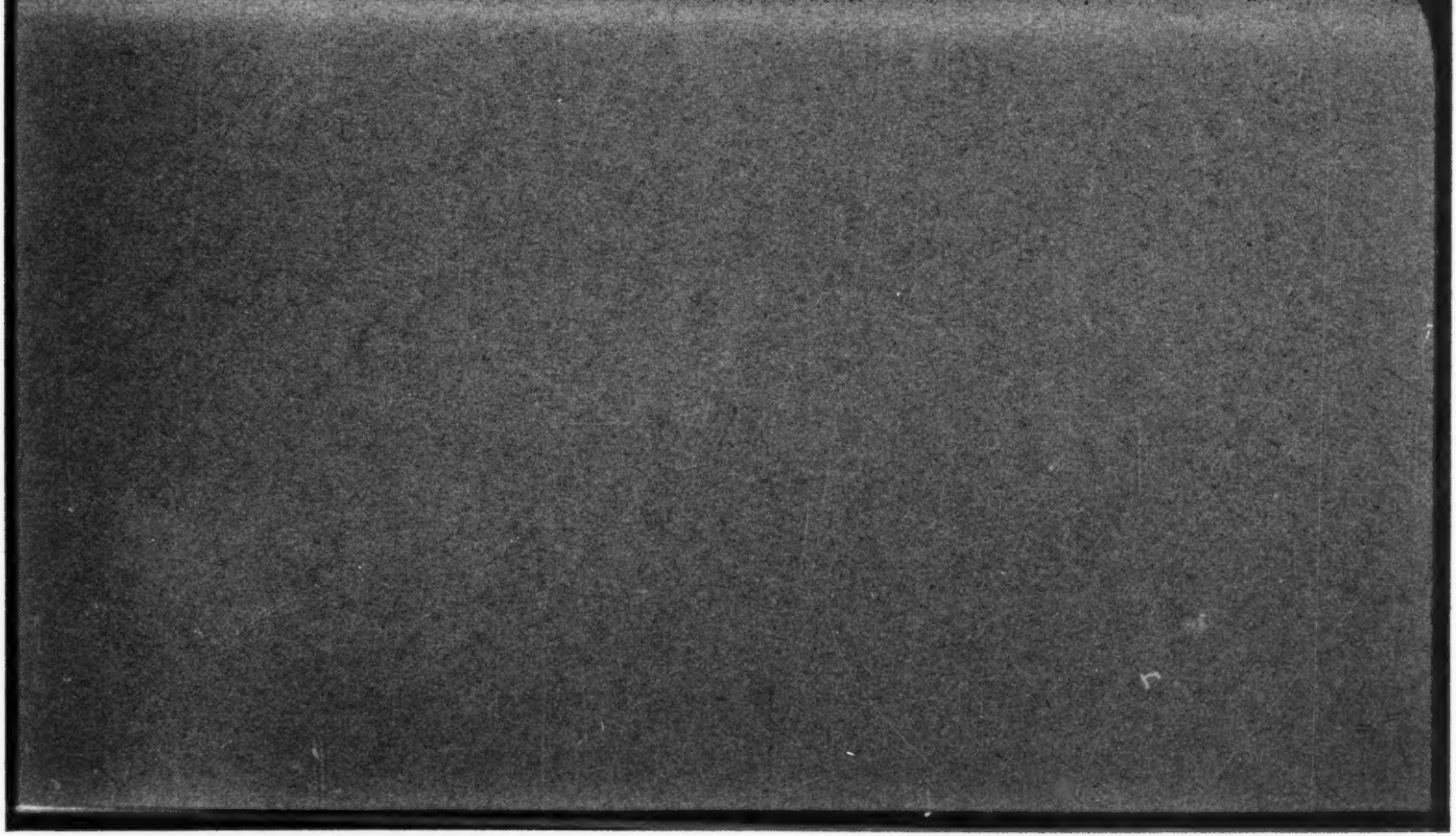

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In the Supreme Court
OF THE
United States

October Term, 1917

No. 211

Spring Valley Water Company
(a corporation),
Appellant,

vs.

City and County of San Francisco (a municipal corporation), and Tax Collector of said City and County,
Appellees.

BRIEF FOR APPELLANT.

This appeal involves the validity of an order of the District Court of the United States for the Northern District of California directing the payment of taxes upon moneys which had been impounded with a San Francisco bank to await the determination of several actions instituted by the appellant, Spring Valley Water Company, to enjoin the enforcement of certain ordi-

nances of the City and County of San Francisco which prescribed rates to be charged for water. These actions, six in number, had been commenced annually from the year 1908 to 1913 inclusive. Pursuant to orders of court and stipulations between the parties, as will be explained in detail hereafter, the excess which the Spring Valley Water Company collected from the rate-payers over and above the rates as fixed by the municipal authorities was deposited in various banks in order that such excess might be returned to the consumers in the event that the ligitation should ultimately result in the ordinance rates being upheld.

In the year 1914 the municipality, for the first time, undertook to tax this impounded fund and, upon the application of the tax collector of the City and County of San Francisco, the District Court made its fourteen separate orders directing the respective banks to pay, out of the moneys impounded with them, the taxes levied against these moneys for the current fiscal year. The present appeal is from the order directing the payment of taxes on the funds held by Mercantile Trust Company of San Francisco. By stipulations entered into between the parties and filed in this court the appeals which have been taken from the other thirteen similar orders are also to be determined by the decision in this case. It should also be stated that similar orders for the payment of taxes on these funds for each of the three subsequent fiscal years (1915, 1916 and 1917) have been made by the court, that appeals from such orders are now pending in the Circuit Court of Appeals, and that these appeals

will also be determined by the decision in this case. A total payment of over $220,000 is accordingly here involved.

Statement of Facts.

The facts as they appear from the stipulation of the parties entered into in the court below (Tr. pp. 2 to 31) are as follows:

In June, 1908, appellant, Spring Valley Water Company, a corporation, filed in what was then the Circuit Court of the United States its bill in equity in action No. 14735 against the City and County of San Francisco and the Board of Supervisors thereof to enjoin the enforcement of rates as fixed by defendants to be charged during the fiscal year 1908-09 for supplying water to the City and County of San Francisco and its inhabitants. The action was instituted on the ground that the rates fixed were unreasonable and confiscatory and would prevent appellant from earning a fair return on the reasonable value of its property devoted to the public service, and that they were therefore violative of the Fourteenth Amendment to the Constitution of the United States. A preliminary injunction was issued and, as one of the conditions thereof, it was required that appellant should deposit in some bank or banks to be agreed upon by the parties to the action the difference between the rates fixed by the municipal authorities and those actually collected by appellant under the injunction, the ultimate disposition of these moneys to depend upon the final outcome of the suit.

It was further provided that such deposits should be subject to the order of the court and should only be paid out on checks drawn by a special master and countersigned by a federal judge. In order to facilitate payment to the ratepayers, if they were finally held to be entitled thereto, the clerk of the court was named as a special master to ascertain and report the amounts collected from each individual consumer. By a subsequent order of court Mercantile Trust Company of San Francisco was designated as the bank in which these funds should be deposited. The order further directed that such deposits should be carried under an account entitled, "Spring Valley Water Company, Special Account", that they should bear interest at the rate of 2 per cent per annum, and that they should be subject to the order of the court as hereinbefore stated (Tr. p. 6).

Similar actions with reference to the water rates, as fixed for each of the years 1909, 1910, 1911, 1912 and 1913 were subsequently instituted, these actions being numbered 14892, 15131, 15344, 15569 and 26, respectively.

In actions numbered 15569 and 26, the procedure was the same as that taken in action numbered 14735, to which reference has been already made in detail. In actions numbered 14892 and 15131, the procedure was also identical except that appellant deposited the moneys collected in excess of the ordinance rates with Mercantile Trust Company of San Francisco without any order of court designating that institution as the particular depository. In action numbered 15344, the

temporary restraining order made no provision for the impounding of the excess moneys, but it was subsequently stipulated by the parties that so long as the order continued in force, the moneys collected in excess of the ordinance rates should be deposited by appellant with Mercantile Trust Company of San Francisco and that such moneys should be repaid to appellant or to the ratepayers, dependent upon the final outcome of the case (Tr. pp. 8 and 9).

In accordance with these orders and stipulations, appellant from time to time deposited with Mercantile Trust Company of San Francisco the moneys collected by it in excess of the rates complained of in the various actions. Subsequently portions of the amounts so deposited in each of the actions were transferred by direction of the court to six other banks, namely, Wells Fargo Nevada National Bank of San Francisco, The Crocker National Bank of San Francisco, The Bank of California National Association, Union Trust Company of San Francisco, The First National Bank of San Francisco, and The Anglo and London Paris National Bank. In each instance these orders provided that the money should be received by the designated banks, subject to the same conditions under which it was originally received by Mercantile Trust Company of San Francisco (Tr. pp. 13, 14).

The moneys found in each of the seven banks on the first Monday in March, 1913, and on the first Monday in March, 1914, were assessed against the respective banks on the assessment roll of the City and County of San Francisco for the fiscal year 1914-1915. The

seven assessments of the amounts on deposit in March, 1913, were made under the provisions of Section 3649 of the Political Code of the State of California, on the ground that these moneys had escaped assessment for the previous fiscal year, 1913-14. In the particular assessment involved in this present appeal the assessment was made to Mercantile Trust Company of San Francisco in the amount of $370,463. The tax was computed on this sum at the rate of $2.289 on each $100 of valuation and amounted to $8479.89.

Each bank was described in the assessment as "Receiver of Impounded Moneys", and was further described as "Receiver or Depositary under order of court of the impounded moneys in Equity Suits Nos. 14275, 14735, 14892, 15131, 15569, 15344 and 26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and the City and County of San Francisco et al defendants". Although each bank, at the time of the assessment, had received deposits in four or more different suits, no separate assessment was made of any money impounded in any specific suit, each bank being assessed on account of moneys as a whole received by it in the seven designated actions in which the Spring Valley Water Company was complainant and the City and County of San Francisco was defendant.

Action No. 14275, referred to in the assessment, was one similar to the other injunction suits and had been commenced in June, 1907, but no moneys were ever impounded in this action either by stipulation of the parties, order of court, or otherwise (Tr. p. 29).

On November 30, 1914, application was made to the District Court by the tax collector for orders directing the several banks to pay the taxes thus assessed against them as receivers. A hearing was had and the court made its fourteen separate orders directing that sums equivalent to the taxes assessed be paid out of the various amounts on deposit with each of the seven banks. The court further ordered that the special master theretofore appointed should draw his checks upon the banks for the payment of those taxes. On appeal to the Circuit Court of Appeals each of these orders was affirmed.

Specification of Errors.

It is clear that unless these taxes were validly assessed the court below had no authority to direct that any portion of the impounded moneys be taken for their payment. Errors have been assigned in the record on appeal from the decision of the Circuit Court of Appeals, in which various grounds for the invalidity of the assessments have been set forth (Tr. pp. 62 to 64). These assignments will, as a matter of convenience, be here discussed under the following heads:

1. The assessments to the Mercantile Trust Company and the other banks as receivers or depositories cannot be sustained under the provisions of any statute of the State of California in compliance with which they are claimed to have been made (Assignments Nos. II and III, Tr. p. 63).

2. The assessments were invalid as not containing a sufficient description of the property assessed (Assignments Nos. I, IV, V and VI, Tr. p. 63).

Before considering these specific grounds there is a preliminary matter to which we wish to direct the attention of the court.

Brief of Argument.

(1) Complainant Has Been Deprived of Its Property Without Just or Any Compensation.

The city will urge in this case that the impounded moneys were a part of the property located in the City and County of San Francisco and that the taxing agency of that municipality should have the right to make these moneys bear their due proportion of taxes; that this is a solemn obligation of persons and property and that this appeal is an attempt to evade that duty. This argument, at first blush, has force; but its persuasiveness diminishes as the real situation is disclosed.

In order to earn a fair return upon the reasonable value of its property used and useful in the public service, complainant and appellant was compelled to institute proceedings to enjoin the enforcement of rates which it believed were confiscatory. Its *prima facie* showing was sufficient to persuade the court that its contentions in this regard were correct and that injunctions should issue in each instance. While it does not appear in the record, we think that it is proper to add that this conclusion has since been fortified by a

master's report handed down in October, 1917, in which it is recommended that all of the ordinances in question be declared to be confiscatory and invalid, and that the impounded moneys be returned to complainant. This report is now under submission in the District Court. When the temporary injunctions were issued, however, in the various years with which we are concerned, the court, in order to protect the ratepayers, made the issuance of its several orders conditional upon the deposit by complainant of all amounts collected by it in excess of the rates prescribed by ordinance.

> *Spring Valley Water Co. v. City and County of San Francisco,* 165 Fed. 667, 712.

The orders requiring this deposit and preventing complainant from enjoying the money so deposited deprived complainant of the use of income to which, if its complaints were well-founded, it was entitled; they handicapped it in the conduct of its business; they reduced the interest which it might secure upon this fund in case it was successful in the litigation, to a return of 2 per cent per annum.

As was said by the district judge who decided this case, in ruling that a similar impounding of income should not be required in a later rate case by another utility:

> "As a result, while the party eventually found entitled to the fund, whether it be the utility or the consumer, is deprived of the use of his money for an indefinite period, he can hope at the end of the litigation, to receive little, if anything, more than the principal, with no adequate return for

its use, which looks very much like taking a man's property without just compensation." (*Pacific Gas and Electric Co. v. City and County of San Francisco,* 211 Fed. 202, 4.)

The burden imposed upon complainant in these cases was, therefore, at best, onerous, since it was prevented from enjoying or using the income to which it had made a sufficient preliminary showing that it was entitled. Had there been no other elements involved, the parties interested in the fund would, nevertheless, have found some satisfaction in the fact that it was increasing, through small interest accumulations, at the rate of 2 per cent. Even this scant comfort was, however, denied them. In the first place, there would necessarily be the expenses and allowances to the special master, entirely proper in themselves but which would result in a reduction of the amount which would finally be available for distribution. In the early years of the litigation no further charges against the fund were apparent. The municipality, the defendant in these proceedings, made no effort to recoup itself out of the moneys which it had agreed should be deposited for the benefit either of the ratepayers or of complainant, as the case might be. In 1914, however, the municipality, through its tax collector, attempted to assess this fund, and to take advantage of the fortuitous circumstances that this money had been accumulated awaiting distribution. Had it not been thus accumulated any return to the municipality through taxation of this money would have been so small as to have been negligible. If it had been in the hands of

the ratepayers, of whom there were approximately sixty thousand, it would have been in very small amounts. Each consumer would have been entitled to claim his individual exemption of one hundred dollars (Cal. Const., Art. XIII, Sec. 10½), and would have been entitled to offset debts due from him (Cal. Pol. Code, Sec. 3629, subd. 6); and, moreover, as experience has shown, very few of them would have had the money in hand on assessment day, the first Monday in March, 1914. If the money had, however, been collected and retained by complainant, it would clearly have been distributed to its stockholders or employed in the ordinary course of the company's business. Such a fund as that which has been accumulated in this litigation would not have been maintained. If the decision of the Circuit Court of Appeals is sustained, it means that the city has profited from a peculiar situation and that the parties to this litigation, regardless of which is ultimately successful, have faced a steady and consistent depletion of their property and a reduction of their rights. Not only have they been denied the ordinary privilege of using their property for gain, but the *corpus* of their property has been substantially reduced, year by year.

We refer to these facts, not as being in any way determinative in our opinion of the specific problem raised by this appeal. If the tax was authorized and properly assessed, the hardship resulting from its imposition is not a factor which we ask this court to heed. The situation does, however, we submit, afford a complete and ample justification for submitting to this

tribunal the question of the fund's liability to taxation and warrants us in invoking the application of the rule so often approved by the courts of this country, that statutes imposing liability for taxation are to be strictly construed as against the taxing authority and in favor of the taxpayer. We are thus confronted with the specific question in this case: Were the assessments in question valid and was the District Court empowered to make the order of which we here complain?

(2) The Assessments to the Mercantile Trust Company as Receiver or Depository Cannot be Sustained Under the Provisions of Any Statute of the State of California in Compliance With Which They Are Claimed to Have Been Made.

Two elements are essential to a valid tax levy: First, the existence of taxable property; and second, a valid assessment thereof.

The first question which confronts us is, therefore, whether we have here any taxable property, and in the determination of the second question we shall have to determine what the nature of this property is.

The court will have in mind the origin and status of the so-called impounded moneys. They were made up of collections from ratepayers, which, as collected, were deposited by the Spring Valley Water Company with Mercantile Trust Company of San Francisco. These deposits, so far as the bank was concerned, differed from other deposits only in respect to the conditions under which they might be withdrawn. They

were not in any sense held as a special deposit. The funds were not set aside in the vaults of the bank as they came in. They were mingled with the other resources of the bank, immediately ceased to be identifiable as separate funds, and, so far as the bank was concerned, consisted merely of a credit on its books. On these particular deposits the banks paid 2 per cent interest. The property or property-right involved is therefore a credit, or, what is commonly known as a "solvent credit". This credit was not property either owned or controlled by the bank, but was property owned or controlled by some one else to whom it was payable,—either the Spring Valley Water Company or the ratepayers or the court or the special master.

It is proper at this time to refer to the California statutes governing taxation.

The California constitution, Article XIII, Section 1, provides:

> "Section 1. All property in the state except as otherwise in this Constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property', as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

Section 3617 of the Political Code, which deals with definitions, provides:

> "First. The term 'property' includes moneys, credits, bonds (except railroad or quasi-public corporations), stocks, dues, franchises, and all other

> matters and things, real, personal, and mixed, capable of private ownership."

and

> "Sixth. The term 'credits' means those solvent debts, not secured by mortgage or trust deed, owing to the person, firm, corporation or association assessed."

Section 3629 of the Political Code of the State of California, which provides for the contents of the statement required by the assessor, provides as follows:

> "Section 3629. Contents of statement required by assessor. He must exact from each person a statement under oath, setting forth specifically all the real and personal property owned by such person, or in his possession, or under his control, at twelve o'clock m. on the first Monday in March. Such statement shall be in writing, showing separately:
>
> "1. All property belonging to, claimed by, or in the possession or under the control or management of such person.
>
> * * * * * *
>
> "6. All solvent credits, unsecured by deed of trust, mortgage, or other lien on real or personal property, due or owing to such person."

It is clear, therefore, that property of the character here considered, namely, credits, is taxable.

The next question is whether, being taxable, it was assessed in the manner required by the California statutes.

There is no necessity for our discussing the well-settled principle of law that an assessment must be made in the manner authorized by statute in order to be the basis of a valid tax levy. Taxation is a

proceeding *in invitum*, and the taxing authorities must find a statutory warrant for what they do or their action is a nullity. Every person against whose property a claim for taxes is asserted has a right to a consistent adherence to the statute. He is entitled to every benefit which such strict adherence may incidentally give him, and if a statute providing for an assessment has not been followed a court has no choice. It must hold that the tax is invalid and must assume that there is a substantial and valuable benefit which the taxpayer would derive from a strict adherence to the provisions of the statute.

Section 3628 of the Political Code defines the duties of an assessor in regard to the assessment of property. It declares that he must ascertain all the property in his county subject to taxation and "must assess such property to the persons by whom it was owned or claimed or in whose possession or control it was at twelve o'clock, meridian, on the first Monday in March next preceding". There follows immediately in the statute the declaration that no mistake in the name of the owner or supposed owner of *real* property shall render the assessment thereof invalid, but there is no declaration anywhere in the law that a mistake in the name of the owner of *personal* property shall not render the assessment of such property invalid. It would be superfluous to analyze the reasons for this distinction between personal property and real property. The distinction is there, has been universally observed, and has been recognized as existing by the courts. The decisions of the Supreme Court of Cali-

fornia expressly hold that an assessment of personal property to a named person other than the owner is absolutely void.

In

Houser & Haines Mfg. Co. v. Hargrove, 59 Pac. 947, 949,

it was, for instance, said:

> "Personal property must be assessed to the owner or the person claiming it, or in whose possion or control it was, at 12 o'clock m. on the first Monday of March next preceding the assessment. Pol. Code, sec. 3628. Without a valid assessment, all subsequent proceedings are nullities, and in making the assessment the provisions of the statute under which it is to be made must be observed with particularity. An assessment of personal property to a named person other than the owner is absolutely void."

In

City of San Luis Obispo v. Pettit, 87 Cal. 499, 502,

the Supreme Court of California determined that where a sum of money had been deposited with the county treasurer in his official capacity under order of a superior court in a pending suit, the assessment of that fund to the plaintiff in the case instead of to the county treasurer rendered the assessment invalid. The court, in considering Section 3628 of the Political Code, which provides that no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid, conceded the application of the section to real property but held that it had no

application to personal property,—and it is, of course, personal property with which we are here concerned. The court said:

> "It is true that the code provides that 'no mistake in the name of the owner or supposed owner of real property shall render the assessment thereof invalid' * * * But whatever may be the meaning of this provision, it does not apply to personal property."

So strict and unalterable is this rule that it has even been held that an assessment to Sulphur Banks Q. S. M. Co. was not a valid assessment against Sulphur Banks Quicksilver Mining Company. We quote from the decision in

Lake County v. S. B. Q. M. Co., 66 Cal. 17:

> "Unless we can take judicial notice that 'Sulphur Banks Q. S. M. Co.' is the equivalent or an abbreviation of 'Sulphur Banks Quicksilver Mining Company', or unless there was evidence tending to prove that the corporation defendant was known by the name 'Sulphur Banks Q. S. M. Co.' the assessment of the personal property cannot be upheld. Tax proceedings are *in invitum*, and to be valid, must be in strict accordance with the statute. Without an assessment, all subsequent proceedings are nullities; and, in making the assessment the provisions of the statute under which it is to be made must be observed with particularity. * * *
>
> "'Sulphur Banks Q. S. M. Co., F. Fiedler, Agt.', is not the same thing as 'Sulphur Bank Quicksilver Mining Company'. We may conjecture, or very strongly suspect, that the assessor *meant* to assess the defendant as the owner of the personal property, but he did not assess the defendant. * * * It is plain that we cannot identify the name to which the personal property was assessed as an

abbreviation of the name of defendant, even if an assessment to an abbreviation would be valid."

This rule, that the validity of any tax depends directly upon the making of an assessment in the manner prescribed by statute and that unless the provisions of the statute governing the particular instance are observed the assessment is invalid and the tax is illegal, is fundamental.

Our next problem is to ascertain whether the requirements of the statutes of California were observed in the assessments which were made in this case.

The court will recall that these so-called impounded moneys were assessed to Mercantile Trust Company of San Francisco, as receiver or depository. While they were called impounded moneys they obviously ceased to be moneys in a strict and literal sense when they were deposited in these banks. They then became credits like any other bank deposits, and if assessed at all, must, in the absence of some statutory provision, be assessed under the statutes and decisions which we have quoted to the person by whom they were owned or claimed or in whose possession or control they were, or to whom they were due or owing. The credit was obviously neither owned nor claimed by, or due or owing to, the bank. It was neither in its possession nor under its control. It was owned by or due to, either the Water Company or the ratepayers. It was claimed by both. It was not in any sense in the possession of the bank. Like any chose in action, it was not susceptible of possession. It was under the control of the court and its special master. But the assessment

was neither to the Water Company nor to the ratepayers nor to the court nor to the special master.

It is clear, therefore, that under the statutes to which we have up to this point referred, the assessment was clearly invalid in that it was not an assessment to the person by whom the credit was owned or claimed or in whose possession or control it was or to whom it was due or owing. In this conclusion we believe that we are in agreement with the city, because the assessment in question was made and is claimed to have been made with reliance upon an entirely different statutory provision. It may be conceded that the legislature might by special statute provide a convenient method of assessing such a credit as that with which we are dealing to some one other than the person owning or claiming or possessing or controlling it. To do so would be an anomaly, however, and there is no claim that there is any such statutory provision unless it is found in Section 3647 of the Political Code, the section upon which respondent relies on this appeal. That section provides as follows:

> "Section 3647. Property and money in litigation. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver and the taxes be paid thereon under the direction of the court."

It is this section under which it is sought to justify the assessment in our case. It is claimed that the bank is a receiver; that it is in possession of the property assessed, and that, therefore, this assessment was properly made to the bank, as receiver. The answer to the

argument is that the bank is not a receiver in any sense of the word, and that this particular property is not property in its possession. We shall consider the last point first.

There was no money or property in litigation in possession of the bank.

Section 3647 of the Political Code does not purport to enlarge the class of taxable property. The California Constitution itself contains the declaration that all property in the state, except as otherwise provided, and not exempt under the laws of the United States, shall be taxed in proportion to its value (California Constitution, Article XIII, Section 1). The word "property" is there, as we have said, declared to include moneys and credits and all other matters and things capable of private ownership. The Political Code in its turn declares that all taxable property must be assessed at its full cash value (California Political Code, Section 3627). This particular section, then, deals only with the method of assessment of property of a particular kind. It limits the manner in which this special kind of property can be assessed; it does not enlarge the class of property subject to assessment. If there is property similar in character to the property there described which is not in terms included within it, or for the assessment of which it makes no provision, that fact does not warrant a court in going beyond its terms. The provisions of the Political Code which we have already quoted are sufficiently broad to cover property not included within the special classes defined within this section.

We entertain considerable doubt as to whether the terms "money and property in litigation in possession of a county treasurer, etc." are sufficiently broad to include credits. While it is beyond question under Section 3617 of the California Political Code, to which we have already referred, that the term "property" includes credits, it is not at all clear that credits can be said to be "in possession" of anyone. This uncertainty is emphasized by the provisions of Section 3629 of the California Political Code which makes the plain distinction between "all property belonging to, claimed by, or in the possession or under the control or management of" a person and "all solvent credits * * * *due or owing to*" an individual. Choses in action are property rights, intangible, and of a different character entirely from ordinary property which is susceptible of physical control and actual possession. It is possible that the case of

Los Angeles v. Los Angeles City Water Co., 137 Cal. 699,

may be construed as holding that solvent credits are assessable under Section 3647. The opinion is not clear. But since it is by no means essential to our argument that the section should be limited in this manner, we shall proceed without giving further consideration to this doubtful question.

If it be conceded, therefore, that solvent credits are included within the definition of the word "property", the assessment of which is provided for in the foregoing section, appellees are confronted with a further difficulty which it is impossible for them to overcome.

It is plain that the credits in this case are not credits in favor of or due or owing, or to quote the language of the section, "in the possession of" the banks to whom they were assessed. Such would be an absurdity. A person cannot be both a debtor and a creditor with regard to any single deposit, and the bank in the present case is obviously a debtor and nothing more. It did not hold, it was not in possession of the credit. Its only connection with the litigation lay in the fact that it had accepted a deposit which it was free to use as it chose, subject only to the restriction that it should pay on an appropriate demand a certain sum of money.

This is all, to us, so clear that, conceding the nature of the property right which would seem to be beyond question, and conceding further the rules with regard to assessments which are not only set forth in the statutes which we have quoted but which have also been construed by the highest court of California, we are tempted to dismiss without extended comment the contention that the banks were receivers. In view of the emphasis placed by the Circuit Court of Appeals upon this phase of the problem, however, we feel compelled to consider it.

The banks were not and are not receivers.

Appellees make no claim that in this litigation the banks occupied the position of either county treasurers or county clerks in possession of money or property in litigation. They rest their argument and their case upon the proposition that the banks were receivers and unless that argument is sustained it is conceded that

the assessment was invalid and the tax void. If the banks were not receivers the assessments were unauthorized, were not made to a party designated by law, and were, as we have heretofore shown, under the decisions of the California Supreme Court, void.

It is proper at this point to recall once again the relation between the banks against whom the assessments were made and the parties to this litigation. The Spring Valley Water Company was required, by the terms of the order enjoining the enforcement of the ordinances in question, to deposit with Mercantile Trust Company the amount collected by it in excess of the ordinance rates. This amount was so deposited and an account was opened designated "Spring Valley Water Company, Special Account". Withdrawals were to be by checks signed by a special master and countersigned by a federal judge. This was an ordinary deposit to be withdrawn upon specified conditions, a normal and customary procedure. The banks have never appeared nor been required to appear in the action; no order has ever been made requiring them to give a bond as receivers must do under the general practice; they have not been required to render any report or to perform any service of any character. They are indebted to the court's nominees. Apart from this one obligation there is no connection between the court and the banks. They occupy identically the same relation to the court that they do to every individual who has deposited funds with them.

With all respect to the court below, which decided otherwise, it is in our opinion an absurdity to contend

that there is a receiver in this litigation. There is no individual or institution which has any of the characteristics of such an official, and it was not the intention of the court or the understanding of the parties that any such office was being created at the time the restraining orders were issued. If, however, there was such an official, it was the special master appointed by the court. This special master was, as we have said, appointed for the convenience of the court and the parties in case the moneys were to be returned to the ratepayers. His signature was essential to the distribution of the moneys. If anyone outside of the court itself was in control of the obligation of the banks to the court it was the special master. To hold that the banks were receivers would necessarily require a conclusion that when any duly appointed receiver deposits moneys in a bank the latter, by such deposit, also becomes a receiver in the case, and an officer of the court.

The Circuit Court of Appeals, in considering this question, held, after referring to decisions of this court and to other authorities, that the funds were *in custodia legis* and that the banks, by the authority of the court, became receivers. It is clear that there were no "funds" whatever "*in custodia legis*"; the court had parted with the right to both control and possession of the funds and accepted a credit in their place. That this was clear to the court below is shown by the court's apprehension as to the possible failure of the banks. We quote again from the case of

Pacific Gas and Elec. Co. v. City and County of San Francisco, supra (203).

"* * * it has resulted in the accumulation of a very large fund under the impounding requirement, which has become a source of more or less anxiety and disturbance to the court. As such a fund is not regarded as a proper subject for the registry of the court, the only practical way of securing its safekeeping is by requiring its deposit in a bank or banks; but, obviously, when so kept its safety can be no more assured than the solvency of the institution with which it is kept. In the Spring Valley cases the fund has grown so great that the court has felt impelled, in order to avoid the risk necessarily incident to keeping the entire sum in one bank, to order its distribution among the different banks in the city designated as depositaries in bankruptcy; but manifestly this is but distributing the risk of loss, and not avoiding it. Moreover, since the fund must of necessity be deposited practically on call, the banks are not disposed, nor could they be expected, to pay more than a merely nominal rate of interest for the use of the money while in their hands."

Let us return, however, to the conclusion of the Circuit Court of Appeals, that the defendants were receivers. Support for this decision was claimed primarily from the opinion of this court in

Booth v. Clark, 17 How. 322,

in which it is said:

"A receiver is an indifferent person between parties *appointed* by the court to receive the rents, issues or profits of land or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it." (Italics our own.)

If the broad construction placed by the Court of Appeals upon this language is warranted, county clerks and county treasurers are also receivers and any exact analysis of the attributes of a receiver is impossible. We submit that this construction was not intended and is not warranted. An examination of the opinion shows that the court was not here attempting an exact definition of the term "receiver". But, at any rate, this decision, as well as the other decisions referred to in the opinion, requires an *appointment*. It contemplates a definite relationship between the court and its appointee,—the performance of prescribed duties. The receiver is said "to be the arm and the hand of the court, a part of the machinery of the court". These elements are all lacking here. Furthermore, the framers of Section 3647 plainly had in mind the ordinary receiver, duly appointed and qualified, capable of, and actually performing under order of court, specific duties. Otherwise county treasurers and county clerks would not have been enumerated. An attempt might have been made to subject all funds in litigation to taxation by general description, but there was no such attempt. It was only funds in litigation, *in possession of certain specified individuals,* against whom it was sought to impose a tax; the banks in our case do not come within this description.

There is in every instance with which we are familiar the requirement of a definite appointment by a court with the necessary responsibilities which such an appointment carries with it, responsibilities not only in the way of custody, but of care and management. There

were no such elements in this case. Money was in this litigation, deposited with certain banks and the only obligation of those banks was to repay it upon compliance with the terms under which it was deposited. The obligation was contractual. There was no fiduciary relation created. As against the banks the court had but one right, to require that its checks, drawn in accordance with the terms of deposit, be honored.

While this line of reasoning seems to us by itself conclusive, we are not without judicial authority on the point. It has been squarely held in at least one case that a banker with whom money in litigation is deposited, under order of court, is not a receiver.

The Supreme Court of Georgia, in

Coleman v. Salisbury, 52 Ga. 471,

clearly decided that the procedure followed in that case and in our case did not constitute the bank a receiver. In that litigation money from a sheriff's sale under attachment had, by order of the court, been deposited with a certain banker upon condition that he hold the same subject to the order of the court, paying interest upon the money as long as it remained in his hands. He became insolvent and made an assignment for the benefit of creditors. This assignment covered, among other property, an amount of money greater than the sum so deposited. These moneys all passed into the possession of the assignee. The court subsequently appointed a receiver of the original fund and its receiver applied to the court for an order on the banker's assignee to pay the money over to him. This

was upon the assumption that the banker had been a receiver and that his assignee took the fund subject to the orders of the court. The court held, however, to the contrary, showing that the order of the court directing the money to be deposited with him did not constitute him a receiver. We quote from the opinion as follows:

> "But we do not think that the order of the court directing the money to be deposited with John King, upon condition that he pay seven per cent. thereon as long as it is in his hands, constitutes him a receiver, so that his assignees are subject to a rule for its payment to the receiver now appointed. We will not say that a receiver may not be appointed upon such terms as would bind him, under the law holding him as an officer of court, to pay the interest and at the same time be subject to the usual rules that may issue against receivers.
>
> "But the terms of the order having this effect, should be explicit, and accepted accordingly. This order falls short of that, and the court was not in error in refusing to compel the assignees of a banker, with whom money was deposited as this was, to summarily pay it to a receiver subsequently appointed, or upon refusal or inability so to do, to be liable themselves to be attached."

Mercantile Trust Company never submitted itself to the jurisdiction of the court or in any way became connected with the pending litigation other than to honor such checks as were subsequently drawn against the deposit in accordance with the understanding upon which the deposit was received. If this procedure resulted in the bank becoming a receiver, certainly an officer of a court never more unwittingly accepted such an appointment.

A further element of the relationship between court and depository, absolutely inconsistent with the theory that the bank was a receiver, is apparent. The banks became vested with the legal title to the moneys which were deposited with them,—they were free to dispose of the deposits as they saw fit. They were not custodians of a specific fund. A receiver takes only the custody and possession of property over which he has been appointed and acquires no right or title thereto.

The Union National Bank of Chicago v. The Bank of Kansas City, 136 U. S. 223; 34 L. Ed. 341;

Quincy, Missouri & Pacific R. R. Co. v. Humphreys, 145 U. S. 82; 36 L. Ed. 632;

High on Receivers, 4th Ed., Sec. 5.

It will thus be seen that every test which would ordinarily be applied to determine the status of the banks shows that they were in no sense receivers.

The suggestion is, however, advanced that although the banks were not, within any of the decisions, strictly receivers, they, nevertheless, under a liberal construction, fall within that category. To this we reply that no construction, however liberal, can make a receiver out of the bank in this instance. But, in addition, it is a principle, too well-established to require extended citation, that statutes imposing liability for taxation are always strictly construed in favor of the taxpayer and are never liberally construed in favor of the taxing authority.

In

Eidman v. Martinez, 184 U. S. 578; 46 L. Ed. 697, 701,

this court said:

> "It is an old and familiar rule of the English courts, applicable to all forms of taxation, and particularly special taxes, that the sovereign is bound to express its intention to tax in clear and unambiguous language, and that a liberal construction be given to words of exception *confining* the operation of duty (citing cases).
>
> "We have ourselves had repeated occasion to hold that the customs revenue laws should be liberally interpreted in favor of the importer, and that the intent of Congress to impose or increase a tax upon imports should be expressed in clear and unambiguous language."

The same principle is applied in

United States v. Wigglesworth, 2 Story 367;

San Francisco v. Banbury, 106 Cal. 129.

There is an instance where this principle was given effect in a situation essentially similar to that found in the present case.

State v. Irons, 35 N. J. Law 464.

Under a New Jersey statute providing for the assessment of personal property in the possession and under the control of trustees, guardians, etc., it was sought to levy a tax upon properties in the hands of a court commissioner appointed to partition and sell real estate. The court held that the word "trustee" as it appeared in the statute did not have the broad meaning contended for but was used in a technical and restricted

sense and the tax in controversy was declared to be invalid.

Our contention accordingly is that the so-called "impounded moneys" are solvent credits and are not within the property provided for by this section, because they could not be, from their nature, in any sense possessed; that if solvent credits are included, the banks are not receivers of the solvent credits because they are the persons who owe the money, not the persons to whom it is owed; and, as a corollary, that they are not receivers at all within any ordinary meaning of the term such as must be given to it in this section. It will, however, no doubt be urged that these impounded moneys are, as their designation implies, moneys instead of credits, and that, therefore, they are money in the possession of the bank as receiver, and that the assessment to the bank is, therefore, a proper one. This argument involves, first, a misapplication of the term "receiver", and second, a total misconception of the relation of the bank to this money. Although the particular depository in the present case was a trust company, this was merely an accident. It did not hold the funds in any trust capacity. It was not in any sense a trustee of them. It was merely a bank holding the funds in the same way in which they were held by other national banks with which, as the record shows, other portions of these collections were deposited, and by which an annual interest charge of 2 per cent on such deposits was paid. If the bank had held these funds as trustee they should have been assessed to it as trustee under Section 3639 of the Political Code, ex-

pressly providing for such assessment. Any other assessment would have been invalid. Not having taken them as trustee, it took them merely as a banker. They became mingled with its other funds and it thereafter occupied, with regard to them, the same relation of debtor which it occupied to its other depositors.

Under no possible theory can it be held that the assessments were valid, and it necessarily follows that the tax was void.

(3) The Assessments Were Erroneous in Describing the Moneys as Having Been Deposited in an Action in Which No Moneys Were Deposited And In Not Separately Assessing the Amounts on Deposit in Each Action.

Not only were the assessments themselves fundamentally improper and unauthorized, but, conceding, for the purposes of this discussion only, their propriety, they were not properly made.

As we have heretofore stated, each of the assessments referred to the moneys as having been deposited in the action instituted in 1907, and numbered 14275. No moneys were impounded in this suit. Furthermore, the assessments did not attempt to segregate the amounts on deposit in any particular action, but assessed as a unit all the funds which had been deposited in any one bank, regardless of the different proceedings through which the deposits had been made. It is submitted that under rulings of the Supreme Court of California, requiring extreme exactness in the case of personal property assessments, and to

which we have already referred, the assessments in question are plainly erroneous and void.

Although it so happens that the corporation is complainant in each of the actions, the defendants are not identical. Different issues are involved in the different actions and different judgments may ultimately be rendered; complainant may, for instance be successful in a suit involving one year's rates and unsuccessful in that involving funds of another. Furthermore, the ratepayers interested in the outcome of the several actions vary materially from year to year. In no way is the total fund on deposit with any one bank a unit. It is composed of different amounts, subject to different claims and deposited under varying circumstances. That this contention is sound is substantiated by the action of the District Court in distributing the funds originally deposited with Mercantile Trust Company of San Francisco. In effecting such a distribution to the other banks herein referred to, a separate order with reference to the funds on deposit in each respective action has always been made by the court and the amount credited to each action is as separate and distinct a fund as if all of the parties to the action were different and as if the actions were pending in different courts. The only possible justification for the procedure followed would lie in the fact that the assessments were made against the banks and not against the funds impounded. If that had been so, it would of course have been of no consequence either to complainant or to the ratepayers what the amount of the tax was or what the method of its enforcement might be. The

theory that the banks were liable for the taxes was not, however, the one on which the taxing authorities proceeded, and would have been clearly untenable under the requirements of Section 14 of Article XIII of the Constitution of California, providing for a state tax upon the capital stock of banks. This tax is expressly made in lieu of all other taxes against banks,—state, county, and municipal—except taxes on real estate.

To assess as a unit these moneys impounded in the various suits was as erroneous as would have been an assessment of the bank deposits of two separate depositors against the depositors jointly; or, to give an example very similar to the situation involved in the present case, the proceeding followed was as much error as it would have been, had a lump assessment been made of the moneys impounded in a bank under order of court by a water company in one proceeding and by a telephone company in another. For the purposes of taxation of the funds in question there is no more connection between the moneys deposited in a suit for one year and in another suit for a subsequent year than there is between the deposits by this complainant in one suit and a telephone company complainant in another. In the latter case the respondent must concede that the invalidity of a joint assessment would be patent. To say, as the Circuit Court of Appeals has said, that the matter is simply one of bookkeeping and that no difficulties of apportionment or computation would be encountered, loses sight of the essential requirements of the law of taxation.

In litigation arising in the State of New York, entitled,

People v. Feitner, 56 N. Y. S. 407,

the error of a similar unit assessment of different trust funds held by the same trustee was pointed out by the New York Supreme Court. No material distinction can be found to exist between the situation there involved and the one presented here. A segregation of the funds and a separate assessment for each unit was, from the very nature of the case, essential.

SUMMARY.

If appellant's contentions in this litigation be finally sustained, it will be entitled to receive the original amounts temporarily impounded under order of court. The City and County of San Francisco has no claim or interest in any portion of this fund and any attempt upon its part to deplete it by taxation should not be countenanced unless there has been a clear compliance with the state laws with regard to the levy and assessment of taxes. That there has been no such compliance here is manifest. In the first place, the assessments cannot be sustained under the provisions of any statute of the State of California in compliance with which they are claimed to have been made. In the second place, the assessments are clearly invalid because they refer to funds deposited in an action where no deposits were in fact made and because they fail to segregate the amounts deposited in the several entirely separate and distinct suits.

We respectfully submit that, upon a correct interpretation and application of the statutes governing this controversy, the order of the District Court directing the withdrawal of a portion of this impounded money for the payment of taxes should be reversed and that the amounts heretofore withdrawn should be returned to the fund, and that to do that will be to do equity in this case.

Dated, San Francisco,
January 2, 1918.

Respectfully submitted,

EDWARD J. McCUTCHEN,
IRA A. CAMPBELL,
A. CRAWFORD GREENE,
Solicitors for Appellant.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1917.

No. 211.

File No. 25,380.

SPRING VALLEY WATER COMPANY (a Corporation),
Appellant,
vs.
CITY AND COUNTY OF SAN FRANCICO (a Municipal Corporation) and TAX COLLECTOR of said City and County,
Appellees.

BRIEF FOR APPELLEES.

FACTS.

The facts on which the orders appealed from were based are sufficiently stated in appellant's brief, although one or two special references to the record will be hereinafter made. For the convenience of the Court the clear and convincing opinion rendered by the Circuit Court of Appeals for the Ninth Circuit

has been incorporated in the transcript of the record on appeal.

Assignments of Error.

Seven assignments of error are raised on this appeal, which will be discussed in the order in which they are stated. All, it is submitted, are without merit.

I.

The first assignment is general in its terms and goes to the general validity of the original order of the District Judge directing the payment of the taxes in question. We conceive the following principles to be of controlling interest in reviewing this assignment:

First: It is a fundamental principle of law and public policy that all property is subject to taxation unless explicitly excepted by the legislature.

Article XIII, Section 1 of the Constitution of the State of California provides:

> "All property in the state except as otherwise in this constitution provided, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law, or as hereinafter provided. The word 'property', as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal, and mixed, capable of private ownership."

Section 10 of the same article reads as follows:

> "All property, except as otherwise in this constitution provided, shall be assessed in the county,

city, city and county, town or township, or district in which it is situated, in the manner prescribed by law."

The Political Code of California contains the following provisions:

"Sec. 3607. All property in this state, not exempt under the laws of the United States, excepting fruit and nut bearing trees under the age of four years from the time of planting in orchard form, and grapevines under the age of three years from the time of planting in vineyard form, growings crops, property used exclusively for public schools, free public libraries, and free museums, and such as may belong to the United States, this State, or to any county or municipal corporation within this State, is subject to taxation, as in this code provided; but nothing in this code shall be construed to require or permit double taxation."

"Sec. 3617. * * * The term 'property' includes moneys, credits, bonds (except railroad or quasi-public corporations), stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

"Sec. 3627. All taxable property must be assessed at its full cash value." * * *

"Sec. 3647. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

The courts have uniformly affirmed this principle. In *Swarts* vs. *Hammer*, 120 Federal, 256, 257, it was said:

"Exemption from taxation is never presumed. The legislative intent to exempt property from taxation must be clearly and explicitly expressed. * * * It has never been questioned but what

> property in the custody and control of receivers and trustees of the federal courts was subject to taxation, under the state law, the same as other like property. * * * It is a grave mistake to suppose that property in the possession and custody of an officer of the federal court, by that single fact enjoys immunity from taxation."

The ruling in the above case was affirmed on appeal to the Supreme Court, 194 U. S. 441, 48 L. ed. 1060, Mr. Justice McKenna observing:

> "By the transfer to the trustee no mysterious or peculiar ownership or qualities are given to the property. It is dedicated, it is true, to the payment of the creditors of the bankrupt, but there is nothing in that to withdraw it from the necessity of protection by the state and municipality or which should exempt it from its obligations to either. If Congress has the power to declare otherwise and wished to do so, the intention would be clearly expressed, not left to be collected or inferred from disputable considerations of convenience in administering the estate of the bankrupt. Though the opinion of the circuit court of appeals is brief, it is difficult to add anything to its conclusiveness. But, as showing the trend of judicial opinion, we may refer to *Re Conhaim*, 100 Fed. 268; *Re Keller*, 109 Fed. 131; *Re Sims*, 118 Fed. 356. Decree affirmed."

Second: The taking of property into the hands of a court through its officers does not withdraw it from taxation.

The propriety of this rule has been given universal judicial recognition. In *Coy* vs. *Title Guarantee and Trust Co.*, 220 Federal, 90, 92, it was said:

> "It is too clear for argument that the appointment of a receiver and the taking of property into

> the hands of the court through its officers does not withdraw it from taxation. It remains subject to assessment and to the payment of all legal taxes thereon while *in custodia legis* to the same extent as it was while in the possession of the owner. And whether or not such taxes be a lien or a debt by the laws of the government within whose jurisdiction the property is situated, such taxes are and should be regarded by the courts as a preferred and paramount claim over all other claims, for they are essential to the existence and maintenance of the very government under which the property is acquired and protected."

See also the rule in *Swarts* vs. *Hammer,* cited *supra.*

> *In re Crowell,* 199 Federal, 659, 660;
> Cooley on Taxation (3rd ed.), vol. 2, p. 834;
> High on Receivers (4th ed.), sec. 881a.

While we do not understand that the principles laid down in the foregoing authorities are disputed by appellant, we believe their citation in full to be important as a guide to the Court in determining the application of the provisions of Section 3647 of the Political Code (cited *supra*) to the assessment whose validity is here challenged. They are of special force in showing the fallacy of appellant's attempted development of an "equitable atmosphere" about its appeal on pages 9, 10 and 11 of its brief. This Court cannot concern itself with vain speculations as to who would have secured the money in litigation if appellant had vigorously prosecuted its suits in the District Court instead of letting most of them lie idle under temporary restraining orders for several years during which these large sums accumulated. Nor can

it speculate as to what will eventually happen when the courts shall have finally passed on the recommendations of the Master in Chancery, all of which are being vigorously contested by the defendants below. Appellant professes great solicitude for the rights of the ratepayers as well as its own rights in the litigation. But appellant does not represent the ratepayers; nor have they come before this Court asking that the moneys impounded, to which they have just as much title as appellant at this stage of the litigation, should be held free from the obligation to pay a fair share of the cost of that "protection by the state and municipality", to which Mr. Justice McKenna alluded in the decision of this Court in *Swarts* vs. *Hammer, supra.* In one sentence (p. 10) counsel for appellants allude to the propriety of the deduction from the fund of the special master's "expenses and allowances", and on the next page he complains that "the city has profited from a peculiar situation", because the taxes have also been deducted. Are we then to assume that counsel's conception of an "equitable situation" is one where the city is to afford the police protection for the fund in question, the fire protection for its repository, the paved streets and means of access to this repository, and the owner or owners of the fund pay no part of the cost of this protection? Further reflection will, we think, establish clearly that the city has not profited from any "peculiar situation", but that a "peculiar situation" would have resulted had these funds not been taxed.

Equally futile are counsel's speculations as to what

appellant or the ratepayers would have done with the money ere this, had it been actually distributed to those legally entitled to it. It will be of equal force to say that most of it probably would have been exchanged for taxable property of some class or other, and increased the assessment roll *pro tanto* regardless of ownership. It should be born in mind that all of complainant's properties, except its corporate franchise, are subject to local taxation (California Stats. 1911, p. 530, §1). This clearly distinguishes its case from that of the Pacific Gas and Electric Company, cited by counsel on page 10 of appellant's brief, where the same judge who originally granted these orders had under advisement the question of impounding the excess collections of a gas and electric company whose operative properties are not subject to local taxation in California, but are taxed exclusively for state purposes. In that case the impounding and taxing of the moneys would have imposed an entirely new legal burden of taxation on the property of the gas company should it prove successful in its suit. Not so here where the property is subject to local taxation anyway.

Having thus disposed of the "equitable situation" which appellant's counsel seeks to raise in his brief, we pass to a consideration of the legal points involved on this appeal.

II.

Said taxes were assessed and levied in accordance with Section 3647 of the Political Code of California.

This assertion contravenes the second assignment

of errors raised by appellants. Section 3647, Political Code, reads as follows:

> "Sec. 3647. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver, and the taxes be paid thereon under the direction of the court."

It will be noted that under that section, money or property in the possession of a "county treasurer, of a court, county clerk, or receiver" must be assessed to "such treasurer, clerk or receiver" and the taxes paid under direction of the court. There is no provision in this section for assessing a court as such. Out of respect doubtless for the dignity and convenience of the courts, the law provides that the assessment shall be made to the subordinate officer or agent "in possession" of the fund. The clerk of a federal court is not a county clerk. Hence the assessment could not be legally made to him. Neither was he, as "special master" in this case, in possession of either the fund or the credit for the deposit, i. e., the right to draw it out. (Tr., pp. 4 and 5.) That right was vested solely in the court and the law provides that the taxes shall be assessed against the particular officer or agent of the court "in possession" of the fund. The fund in this case was in the actual possession of the Mercantile Trust Company, subject to the order of the court. It must either be assessed to the bank as a receiver, or, and we understand that this is the position taken by appellant, it must escape taxation.

Such an application of the language of the code as appellant adopts, however, is manifestly contrary to the spirit and intent of the law as shown in the authorities cited in the first section of this brief. It is fundamental, on the other hand, that the courts will give such a construction to the language of the law in determining its application to cases before them as will carry out the manifest intent of the legislature in enacting it. This intent is unmistakably expressed in both Article XIII of Sections 1 and 10 of the Constitution of California, and Sections 3607, 3617 and 3647 of the Political Code (cited *supra*).

The construction of this section by the California Supreme Court is conclusive.

How strongly appellant's contentions are opposed to the entire theory of taxation under this section may be conclusively determined from an examination of a very recent decision of the Supreme Court of California whose interpretation of the laws of this state should be held conclusive by this court where no federal constitutional questions are involved. We refer to the decision in *Bessolo* vs. *City of Los Angeles,* 54 Cal. Dec. 651, decided December 5th, 1917. As the decision has not reached the Pacific Reporter at the date of this writing we insert it here in full:

> "The complaint alleges that in October, 1911, the defendant, the City of Los Angeles, commenced an action against the plaintiff and others to condemn certain lands for public uses. In that action a parcel of land belonging to the plaintiff, Bessolo, was condemned upon payment of $11,310. The sum so awarded to plaintiff was

paid by the city to the county treasurer, and it was in the treasurer's hands on the first Monday of March, 1913. After receiving from the county treasurer a statement of moneys in his hands, belonging to individuals, the city assessor of the defendant city assessed said sum belonging to plaintiff, for Los Angeles city taxes for the year 1913-14, and collected a tax of $174.26 thereon. This tax was paid by the county treasurer out of plaintiff's moneys, without plaintiff's knowledge or consent. On the first Monday in March, 1913, the solvent credits owned by plaintiff, including the $11,310 so awarded to him, aggregating $11,863 and no more. The unsecured debts then owing by him, and assessed to *bona fide* residents of the state, aggregated $15,050, a sum exceeding the solvent credits owned by him. On the first Monday in March, 1913, plaintiff did not own any solvent credits subject to assessment, and said sum of $11,310 was exempt from taxation and was erroneously assessed. On April 16, 1913, plaintiff presented to the city a claim, which set forth the foregoing facts regarding the assessment and collection of taxes, and asked a return of $174.26. Such return was refused, and the complaint, accordingly, prays judgment for the amount of the tax thus collected.

"The demurrer was based on want of facts, lack of jurisdiction of the subject, and various provisions of the statutes of limitations.

"Regardless of other points made, we think the demurrer was properly sustained on the first of these grounds.

"The fund in the hands of the treasurer was not such a 'solvent credit' as, in the purview of our tax laws, is subject to the deduction of debts owed by the plaintiff. It was covered by the terms of section 3647 of the Political Code, which provides that 'money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treas-

urer, clerk, or receiver, and the taxes be paid thereon under the direction of the court'. The right to tax money or other property under this section 'does not depend upon the ownership of the money or property, nor the final result of the litigation'. (*Los Angeles* v. *L. A. City Water Co.*, 137 Cal. 699.) Such money or property is to be assessed to the officer in whose hands it is, and an assessment to the real or ultimate owner is not authorized. (*City of San Luis Obispo* v. *Pettit*, 87 Cal. 499.) There being no allegation to the contrary, we must assume that the assessment in this case was made, as it properly should have been, to the treasurer. Statutory provisions for the deduction of debts from solvent credits (Pol. Code, secs. 3628, 3629, subd. 6, 3650, sub. 15) clearly contemplate the deduction of such debts only as are owed by the person to whom the solvent credits are assessed—not a deduction of debts owed by one person from money, property, or credits assessed to another.

"But if it be conceded that the moneys on deposit constituted a 'solvent credit', from which debts owed by plaintiff could be deducted, he was still not entitled to the deduction unless the amount of such debts were shown by the sworn statement which on demand of the assessor, the taxpayer was required to make. (Pol. Code, sec. 3629, subd. 6.) The complaint does not allege that the assessor failed to exact a statement from plaintiff, or that plaintiff made a statement of any kind, to say nothing of one showing the debts owed by him. (See *Henne* v. *County of Los Angeles*, 129 Cal. 297; *Brenner* v. *Los Angeles*, 160 Cal. 72, 75.) The complaint does not, therefore, exhibit the facts necessary to support plaintiff's claim of a right to have the deduction made.

"The judgment is affirmed."

We submit that the foregoing decision conclusively disposes of appellant's contention (Brief, page 31)

that the assessor in this case in effect assessed "solvent credits" instead of "money in litigation", and also of the proposition that in any event debts owed by the appellant or the ratepayers should be deductible from such "solvent credits", no claims for such deductions having been filed by any of them. Nor, under the foregoing decision, could such claims have been made had it been legally possible to make the assessment to the court or "special master". Appellant is therefore not injured. The case just cited is absolutely in point. The Mercantile Trust Company in this case, as custodian of the funds in litigation, fulfilled, for all purposes of taxation, the function of the county treasurer in the *Bessolo* case. In the latter case the fund had actually been paid into court after a condemnation award for the defendant's use. There was no question such as is found here, as to who was entitled to receive the fund. The argument for the solvent credit theory was much stronger than in the case at bar. Yet the Supreme Court of California held that the assessment of the funds under section 3647, Political Code, as "money in litigation" was proper. That this construction of the application of the provisions of Section 3647 by the California Supreme Court should be conclusive is supported by ample authority in previous decisions of the United States Supreme Court. We cite the following examples:

> "No question is more clearly a matter of local law than one arising under the tax laws. Tax proceedings are carried on by the state for the purpose of collecting its revenue, and the various steps which shall be taken in such proceedings,

the force and effect to be given to any act of the taxing officers, the results to follow the non-payment of taxes, and the form and efficacy of the tax deed, are all subjects which the state has the power to prescribe, and peculiarly and vitally affecting its well-being. *The determination of any questions affecting them is a matter primarily belonging to the courts of the state, and the national tribunals universally follow their rulings except in cases where it is claimed that some right protected by the Federal Constitution has been invaded.*" (Italics are ours.)

Lewis vs. *Monson*, 151 U. S. 545, 549; 38 L. Ed. 265, 266.

"The construction of the constitution or statute of a State by the highest judicial tribunal of such State, in a case not involving any question under the 25th section of the Judiciary Act, is to be regarded as a part of the provision, and that it is as binding upon the courts of the United States as the text."

Hamilton Mfg. Co. vs *Massachusetts*, 6 Wall. 632, 640. 18 L. Ed. 904, 907.

It remains only to determine whether or not the Mercantile Trust Company was a "receiver" within the meaning of Section 3647, Political Code. If it was a receiver appellant's second assignment of error must fail.

III.

The Mercantile Trust Company of San Francisco was a receiver of the moneys in question within the meaning of Section 3647, Political Code.

Appellant's third assignment of error challenges

this allegation. A "receiver" has been defined by the courts to be:

> "An indifferent person between parties appointed by the court to receive the rents, issues, or profits of land, or other thing in question in this court, pending the suit, where it does not seem reasonable to the court that either party should do it."
>
> *Booth* vs. *Clark*, 17 How. 322, 331; 15 L. ed. 164, 168.
>
> "An officer of the court; his appointment is provisional. He is appointed on behalf of all parties, and not of the complainant or of the defendant only. He is appointed for the benefit of all parties who may establish rights in the cause. The money in his hands is *in custodia legis* for whoever can make out a title to it. *Delaney* v. *Mansfield*, 1 Hogan, 234. It is the court itself which has the care of the property in dispute. The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court."
>
> *Atlantic Trust Co.* vs. *Chapman*, 208 U. S. 360, 371; 52 L. ed. 528, 533.
>
> "An indifferent person between the parties, appointed by the court, and on behalf of all parties, and not of the complainant or defendant only, to receive and to hold the thing or property in litigation; pending the suit, to receive the rents, issues, or profits of land or other thing in question; to receive rents or other income, *and to pay ascertained outgoings*, when it does not seem reasonable to the court that either party should hold it; to hold possession and control of property which is the subject matter of litigation, and to dispose of the same or deliver it to such person or persons as may be directed by the court. He is said to be the arm and hand of the court, a

part of the machinery of the court, by which the rights of parties are protected." (Italics are ours.)

34 Cyc. 15.

All of the foregoing authorities were cited with approval in the decision of the court below. To add to them seems superfluous, although many others of a like tenor may be found.

The Mercantile Trust Company fulfills every specification of these definitions. It is "an indifferent person between the parties". It is designated by the preliminary orders of the court in the cases at bar and in the stipulations of the parties as the person who is to "receive the * * * thing in question in the court, pending the suit", and hold it subject to the court's order until one of the parties "can make out a title to it", because it did not "seem reasonable to the court that either party should do it". The mere fact that the bank was not officially termed as "receiver", or placed under bonds at the time the order was made does not affect its position. It was a "*de facto* receiver", nevertheless. This designation is in effect approved by the Circuit Court of Appeals in its opinion below. The requirement of bonds from a trust company of this character would have entailed needless formality and expense without adding anything to the security afforded. It is true, receivers of property in litigation frequently perform functions which might be more extensive than those required or permitted here to the trust company. But there was no reason to provide for a receiver with more extended func-

tions when the sole requirement of the situation was a safe depository and accounting for funds in litigation. The Mercantile Trust Company fulfilled this function and became the court's receiver in so doing.

We should expect to find counsel for appellant commending, rather than criticizing, the court below for handling the moneys in litigation through a single agent, the bank, who should be both "receiver" and "depository", thus saving the expense of a separate receiver's fee. Of course, if a receiver had been formally appointed to collect from complainant and deposit in the bank the funds in litigation, the bank would have not assumed the relationship of a receiver to either the court or the parties, but would have been constituted a mere depository for the separate "receiver's funds". In such event the assessment might have been made to the receiver of the "credit" for the deposit, on the assumption that the credit was "property in litigation" within the meaning of Section 3647. But such a separation of functions was not made and the bank unquestionably stands in the relation of both a "receiver" and a depository to the court and parties in this litigation. It receives its orders direct from the court—the special master performs merely the clerical function of preparing checks for the judge's countersignature and keeping a record of deposits and withdrawals. In each case a formal court order has been required before any checks were signed by the special master and judge for withdrawals (Tr., p. 5). The appellant was required to make its deposits of excess collections directly with the bank (Tr., p. 4).

We doubt not that if the bank should become insolvent that appellant would be among the first to contend that the right of the court to withdraw these moneys is a preferred claim. It appears that in the original order of deposit in case No. 14,735 the moneys were required to be received and held as a "special deposit" (Tr., p. 4), and this language was also used in the orders of tranference to other banks of part of the funds (Tr., p. 14). The mere fact that the bank, as it later appears (Tr., p. 30), elected to commingle the deposit with its general funds, or even if it was permitted to do so, would not affect its liability or the status of the fund under the court's order. Refusal to obey a lawful order of the court directing the disposition of these funds would undoubtedly subject the bank to contempt proceedings. This situation alone is sufficient to distinguish the situation here from that in the case of *Coleman* vs. *Salisbury*, decided by the Supreme Court of Georgia in 1874, upon which counsel places so much reliance (pp. 27 and 28, appellant's brief).

From the foregoing facts and legal definitions we submit that manifestly no error was committed by either of the courts below in accepting the assessor's designation of the bank as a "receiver" for the purpose of making an assessment of the funds in litigation under Section 3647, Political Code. It follows that the assessment to it as "receiver of the moneys in litigation" which were in its possession and control was valid. We are not here concerned with the assessment of "solvent credits", because where the court

itself makes or orders the deposit the law provides that the assessment shall be made directly to the person *in possession of* the money in his or its official capacity. If the direct control of the deposit were held by anyone other than the court itself, the assessment would be against the holder of the credit as receiver because the bank or depository would then lose its direct relation of agency to the court which it holds in this case, and would become merely the debtor of the receiver (assuming, of course, the absence of "special deposit" provisions), while the receiver would be *in possession* of the credit in exchange for the money he had deposited.

The intent of the code provision (Section 3647) to assess all money or property in litigation is too clear to require elaboration here. The intent that the money or property (the latter may be a credit), shall be assessed to the person *in possession* of the same, not necessarily to the person having legal title to it, is equally clear. The intent that the court itself shall not be assessed but rather the person who stands in *direct relation as agent* of the court and subject to the court's order is obvious. The assessment in this case fulfills every one of these requirements. An examination of the authorities cited on page 30 of appellant's brief shows us no case where a court has gone so far in the strict construction of a statute relating to taxation as to hold invalid an assessment which so fully carries out the manifest intent of the legislature as does the one under consideration. It follows, therefore, that no mere quibbling over the failure of the

court below to formally designate the Mercantile Trust Company as a "receiver" when it granted the temporary restraining order in these cases, will justify the Supreme Court in disregarding the first principle of statutory construction. We refer to the rule which requires every judicial tribunal to so interpret the law in its application to the facts of each case as to give the fullest effect to the expressed intent of the legislature.

IV.

The fourth assignment of error is general in its nature and alleges error in the court's ruling that the assessment of said taxes was lawful and valid. We have already dealt with the general rule as to assessment of money or property in litigation under the California Code. It has already been shown that the Mercantile Trust Company was a receiver within the meaning of the provisions of Section 3647 of that code. This assignment then can only have any effect if substantiated by fatal informalities in the assessment itself, and as the only informalities pointed out by appellant are those alluded to in assignments numbered V and VI, our reply will be directed solely to them.

V.

The enumeration by the Assessor in the list of cases of case numbered 14,275, in which no moneys were impounded, was immaterial and harmless error.

Assignment No. V is based upon the fact that the assessor erroneously included in his list of cases in which money had been impounded, case No. 14,275, in which no money was, as a matter of fact, im-

pounded. But this error was clearly so trivial as to be of no weight. If no money was impounded, none was assessed. The record shows that only such moneys were assessed as were actually on deposit with the banks. Nobody's rights were affected and certainly no prejudicial error committed by the court below in summarily dismissing this contention. Section 3885, Political Code of California, provides that "no assessment is illegal on account of informality".

VI.

No error was committed by the Assessor in not separately assessing the funds in each case.

The sixth assignment is of equally little weight. The assessor, it seems, assessed in a lump sum all the moneys on deposit in all of the cases with the Mercantitle Trust Company, specifying, however, the title and numbers of the cases. (Tr., pp. 27 and 28.) As pointed out by the court below, the special master and the bank were required by the impounding order in each case to keep separate account of the moneys deposited under the order in that case, and the apportionment of the taxes among the several cases is a mere matter of accounting detail which can be easily supervised by the court when a final disposition of the moneys impounded in any one or more of the suits is ordered.

Counsel's attempted justification of the assignment on pages 32 to 34 of appellant's brief on the grounds that the ratepayers may vary in identity from year to year is of no weight; first, because the appellant is in no way injured thereby and the ratepayers are not

complaining; second, because the ratepayers are not parties to any of the suits in question and hence there is no difference between the parties to the litigation during the several years. The Spring Valley Water Company is complainant in each case; the City and County of San Francisco and its officials are respondents in each case. The last facts are shown by the assessment itself. There was no question here, as in the case of *People* vs. *Feitner*, cited by counsel on page 35 of appellant's brief, as to what funds were being assessed. To be parallel with that case the assessment here would have had to read "Mercantile Trust Company, Receiver", and nothing further; obviously a very different case than where the titles and numbers of the cases are all included in the assessment record as was done here. (Tr., pp. 27 and 28.)

VII.

There are no jurisdictional questions involved.

The seventh and final assignment denies the jurisdiction of the District Court to make the order for payment of taxes because the amount of money on deposit would thereby be diminished and it would be impossible for the successful party in the litigation to receive the full amount originally impounded, whereas the stipulations and orders of the court originally provided that the sums so deposited should be returned to the complainant or its ratepayers according to the outcome of the litigation.

Counsel have not even alluded to this assignment in appellant's brief (pp. 7 and 8), so we must con-

clude they attach little if any weight to it. In general we think it obvious that no provisions of a restraining order, or stipulation of counsel for the city could nullify the taxing power vested under the laws of the states, nor was it intended by either orders or stipulations to provide for return of the funds at the conclusion of the litigation unimpaired by lawful deductions for taxes or administrative expenses. Counsel admit (p. 10, appellant's brief), that the "expenses and allowances to the special master" are necessary and proper deductions from the fund, notwithstanding orders or stipulations containing general provisions for its disposition. Taxes fall within the same category of deductions to be made before either party obtains a return of the money.

Summary.

The principle that all property should bear its just and equal share of taxation is involved in this case and should receive the approval of the Supreme Court. There is no question of double taxation or injustice to the appellant here. Appellant seeks to place a construction on the provisions of Section 3647 of the Political Code of California, providing for the assessment of money or property in litigation, which, if sustained by this Court, would result in permitting over two million dollars in money to escape taxation altogether, and would throw upon the municipality of San Francisco the burden of refunding over two hundred and twenty thousand dollars in taxes heretofore assessed and collected with the approval of the District Court and Circuit Court of Appeals. The only

ground upon which appellant's contentions can be sustained is that the Mercantile Trust Company, after having received the moneys in litigation under an order of the District Court directing that they be held as a special deposit, subject to the order of the court, to be paid out only on checks drawn by a special master and countersigned by the federal judge sitting in the court, was not a "Receiver" of the "money in litigation" within the meaning of the code section. The status of the bank complies with the judicial definitions of a receiver. It fulfilled all the functions of a receiver required by the circumstances of these cases between the Spring Valley Water Company and the City and County of San Francisco, and the functions of a depository as well. Is the repeated expression of the intention of the people and the Legislature of the State of California that all property not specifically exempted should bear its just share of taxation, to be nullified because the court below failed to explicitly name this bank as a "receiver" in its impounding order? The District Court and the Circuit Court of Appeals have unqualifiedly answered this question in the negative. From the supreme judicial tribunal of the nation we ask an affirmance of their decisions.

Dated, San Francisco, January 14th, 1918.

Respectfully submitted,

GEORGE LULL,
City Attorney,
City and County of San Francisco,
ROBERT M. SEARLS,
Special Counsel,
J. F. ENGLISH,
Assistant City Attorney,
Solicitors for Appellees.

In 1908 the Spring Valley Water Company, the appellant, commenced in the Circuit Court of the United States for the Northern District of California a suit against the City and County of San Francisco to enjoin the enforcement of an ordinance fixing the water rates for that year. A preliminary injunction was granted upon the condition that all sums collected by the Water Company from its customers in excess of the ordinance rates should be deposited in a bank agreed upon by the parties or designated by the court to await the outcome of the litigation. The sums so collected, it was provided, should be received by the bank as a special deposit subject to the order of the court and should be paid out on checks drawn by a special master and countersigned by a judge of the court. Pursuant to a stipulation of the parties the court subsequently designated the Mercantile Trust Company of San Francisco as the depository for the impounded moneys and ordered that the account should be entitled "Spring Valley Water Company—Special Account" and should bear two per cent. interest per annum. Each year following down to 1913 the Water Company brought a similar suit to enjoin the ordinance fixing water rates for the respective year. In four of these five cases a preliminary injunction was granted upon the same condition expressed in the preliminary injunction awarded in the 1908 suit. In the fifth, although a preliminary injunction was granted, no order was made concerning the impounding of sums collected in excess of the ordinance rates, but the parties stipulated that the moneys collected during the year embraced by that suit should also be deposited in the bank designated by the court to await the final outcome of the case. Pursuant to these orders and stipulations the Water Company made deposits of the moneys in the Mercantile Trust Company of San Francisco and from time to time the court, to safeguard the funds, ordered portions of it

transferred from that bank to six other banks in San Francisco. The money thus transferred and deposited in the six banks was placed in special accounts subject to the order of the court, to be withdrawn only by check signed by the special master and countersigned by a judge of the court.

The moneys on deposit in each of the seven banks on the first Mondays in March, 1913 and 1914, were by the local officer assessed for taxation for those years. In each assessment the bank was described as "Receiver of Impounded Moneys" and "Receiver or Depository under Order of Court of the Impounded Moneys in Equity Suits numbered 14,275, 14,735, 14,892, 15,131, 15,569, 15,344 and 26, District Court of the United States, wherein the Spring Valley Water Company is plaintiff and City and County of San Francisco et al., defendants." With the exception of No. 14,275 (which was a suit begun in 1907 to enjoin the water rates of that year and in which the court made no order concerning the impounding of funds and no deposits were made by the Water Company) the suits referred to are those which we have previously mentioned. On application of the tax collector of the City and County of San Francisco the District Court of the United States after notice and a hearing directed the payment of the taxes. As there were two assessments against each of the seven banks, the court issued fourteen orders and to reverse the decrees of the court below affirming the action of the trial court fourteen appeals are prosecuted. (225 Fed. Rep. 728.) While the order under review on this record concerned the assessment of moneys in the possession of the Mercantile Trust Company of San Francisco in March, 1913, and directed the payment of taxes in the sum of $8,479.89, there is a stipulation that the appeals in the other thirteen cases (Nos. 212 to 224) are to be determined by the decision in this.

Mr. Ira A. Campbell, with whom *Mr. Edward J. McCutchen* and *Mr. A. Crawford Greene* were on the brief, for appellant.

Mr. Robert M. Searls, with whom *Mr. George Lull* and *Mr. J. F. English* were on the brief, for appellees.

MR. CHIEF JUSTICE WHITE, after making the foregoing statement, delivered the opinion of the court.

The sole ground urged for reversal is the invalidity of the assessment (a) because it was not authorized by any statute of the State and (b) because it did not contain a sufficient description of the property assessed, and we come to consider these objections under two headings.

(a) That the assessment was authorized by the following section of the Political Code of California we think is clear.

"Section 3647. Property and money in litigation. Money and property in litigation in possession of a county treasurer, of a court, county clerk, or receiver, must be assessed to such treasurer, clerk, or receiver and the taxes be paid thereon under the direction of the court."

Without following and directly answering the argument advanced to sustain the contrary view, we content ourselves with a summary statement of the reasons for our conclusion. Words cannot make clearer than does the language of the text the purpose of the section to tax property or money in litigation in the hands of a court. Indeed the Supreme Court of California has so construed the section. *Los Angeles* v. *Los Angeles City Water Co.*, 137 California, 699; *Bessolo* v. *City of Los Angeles*, 169 Pac. Rep. 372. It is further manifest that the taxation of the money deposited in the injunction suits was what was sought to be accomplished by the assessment which was made. The money assessed was in litigation,

was in the custody of the court and was by its direction placed in the bank in a special account subject to the control of the court. Moreover the assessment to the bank which held the money for the court was a direct compliance with the terms of the section, the description "receiver" being employed in the statute not in a technical sense but as embracing any person acting as agent or depository of funds for a court. To give to the word the narrower meaning contended for would defeat the obvious and adjudged purpose of the statute.

(b) It is contended that the assessment was invalid for want of sufficient description of the property assessed, first, because the assessment purported to assess moneys impounded in the 1907 injunction suit, No. 14,275, when as we have seen no money was in fact deposited in that suit, and second, because the assessment did not separately assess the moneys impounded in each of the six suits but assessed as a unit all the moneys impounded in all the suits.

As to the first, it is apparent that the inclusion of the 1907 suit, No. 14,275, could not operate to assess moneys which had no existence and hence the reference to that suit is wholly negligible. As to the second, the assessment referred to the cases by number and designated the court in which they were pending as well as the parties. The court in exercising its jurisdiction over the moneys had specifically directed their deposit to special accounts in each suit separately, thus enabling it at the termination of the litigation to distribute the funds after apportioning the sum of the tax chargeable to each. It is thus clear that not only was there no want of definiteness in the description of the property but no possible detriment to the Water Company could in any event arise because of the method of assessment which was followed.

Affirmed.